MICHIGAN APPEALS REPORTS

CASES DECIDED

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# MICHIGAN

# COURT OF APPEALS

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CORBIN R. DAVIS
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SEBASTIAN J MANCUSO FAMILY TRUST v CITY OF CHARLEVOIX

Docket No. 309813. Submitted January 10, 2013, at Lansing. Decided February 5, 2013. Approved for publication March 19, 2013, at 9:00 a.m.

The Alice V. Mancuso Family Trust (Alice Trust) conveyed a condominium to the Sebastian J. Mancuso Family Trust (Sebastian Trust). Edwin D. Mancuso and Sebastian D. Mancuso were trustees for both trusts. Following the conveyance, the city of Charlevoix reassessed the property and raised its taxable value to the state equalized value for the calendar year following the assessment, a process known as uncapping that occurs under MCL 211.27a(3) following a transfer of ownership. MCL 211.27a(6)(c) defines "transfer of ownership" as including conveyances to a trust. MCL 211.27a(7)(*l*), however, provides an exception from uncapping for transactions between commonly controlled legal entities. The Sebastian Trust appealed the taxable value in the Tax Tribunal, asserting that the trusts were commonly controlled entities because they have the same trustees. Both the Sebastian Trust and the city moved for summary disposition. The tribunal granted the city's motion, concluding that the trusts could not be commonly controlled entities because under Revenue Administrative Bulletin 1989-48, that status requires that the entities be involved in a trade or business. The Sebastian Trust appealed.

The Court of Appeals *held*:

Even assuming without deciding that the tribunal erred by imposing a business-activity requirement, the Sebastian Trust still could not prevail because it and the Alice Trust were not commonly controlled within the meaning of MCL 211.27a(7)(*l*). Simply having the same trustee does not satisfy the statutory requirement because the statute requires a change in the ownership of the property, not a change in the property's managers. A trustee manages trust property held in trust for the benefit of the trust beneficiaries. Although the trustee has extensive control over the trust, he or she is ultimately liable to the beneficiaries. Under MCL 211.27a(6), a transfer of ownership occurs when the property is transferred from one owner to a wholly new owner. Thus, the

Alice Trust and the Sebastian Trust were not commonly controlled, and the exception in MCL 211.27a(7)(*l*) did not apply.

Affirmed.

TAXATION — PROPERTY TAX — UNCAPPING OF TAXABLE VALUE — TRANSFER OF OWNERSHIP — EXCEPTIONS — COMMONLY CONTROLLED LEGAL ENTITIES — TRUSTS.

The taxable value of real property is reassessed upon a transfer of ownership of property at the state equalized value for the calendar year following the assessment, which is a process known as uncapping; a transfer of ownership includes a conveyance to a trust, but an exception to the definition applies to transactions between commonly controlled legal entities; the exception requires a change in the ownership of the property, not a change in the property's managers, and a transferring trust and receiving trust that have the same trustees are not commonly controlled legal entities for purposes of the exception simply by virtue of having the same trustees (Const 1963, art 9, § 3; MCL 211.27a[3], [6][c], [7][*l*]).

*Steinhardt Pesick & Cohen* (by *Jason C. Long*) for the Sebastian J. Mancuso Family Trust.

*Young, Graham, Elsenheimer & Wendling, P.C.* (by *Lori A. Luckett*), for the city of Charlevoix.

Amicus Curiae:

*Bill Schuette*, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Matthew B. Hodges*, Assistant Attorney General, for the State Tax Commission.

Before: OWENS, P.J., and FITZGERALD and RIORDAN, JJ.

PER CURIAM. Petitioner appeals as of right an order of the Tax Tribunal denying petitioner's motion for summary disposition and granting summary disposition pursuant to MCR 2.116(I)(2) in favor of respondent, the city of Charlevoix. The tribunal determined that petitioner's acquisition of real property was a transfer of

ownership that uncapped the taxable value of the property under the General Property Tax Act (GPTA), MCL 211.1 *et seq*. We affirm.

## I. FACTS AND PROCEDURAL HISTORY

Petitioner is the Sebastian J. Mancuso Family Trust. Edwin W. Mancuso and Sebastian D. Mancuso are the successor trustees of the trust. They are also the trustees for the Alice V. Mancuso Family Trust (Alice Trust).[1] The trustees conveyed a condominium from the Alice Trust to petitioner by means of a warranty deed. Following this conveyance, respondent reassessed the property and raised the taxable value of the property beginning with tax year 2007.

Petitioner appealed the taxable value of the property to the Tax Tribunal. Both parties moved for summary disposition. Petitioner asserted that the conveyance of the property from the Alice Trust to petitioner was not a transfer of ownership that would operate to remove the cap of the property's taxable value. Specifically, petitioner asserted that the Alice Trust and petitioner are commonly controlled legal entities and, therefore, a transfer of ownership did not occur because of the exception from the definition of "transfer of ownership" in MCL 211.27a(7)(*l*). On March 23, 2012, the tribunal issued an order denying petitioner's motion and granting respondent's motion. The tribunal opined in relevant part:

> As acknowledged by both parties, State Tax Commission Bulletin 16 of 1995 provides an interpretation of the statutory provisions regarding the "uncapping" of taxable value. With respect to the exception from the "uncapping"

[1] Edwin W. Mancuso and Sebastian D. Mancuso are jointly referred to as trustees in this opinion.

> of taxable value applicable to transfers of property between commonly controlled legal entities, the [State Tax Commission] Bulletin provides that an entity under common control is as defined in the Michigan Revenue Administrative Bulletin 1989-48 [RAB 1989-48]. In that regard, the [revenue administrative bulletin] specifically provides that for entities transferring property to be considered as "commonly controlled," these entities must be involved in a trade or business.

The tribunal found persuasive this Court's decision in *C & J Investments of Grayling, LLC v City of Grayling*, unpublished opinion per curiam of the Court of Appeals, issued November 13, 2007 (Docket No. 270989). The tribunal noted that no subsequent precedential authority existed contrary to this Court's conclusion in *C & J Investments* that

> RAB 1989-48 represents an authoritative interpretation of the phrase "commonly controlled" by the agency responsible for administering and enforcing the statute. A court will defer to the interpretation of statutes administered and enforced by the Tax Tribunal. Although tax statutes may not be extended by forced construction or implication . . . we conclude that RAB 1989-48 is not inconsistent with the plain meaning of "commonly controlled" in MCL 211.27a(7)(l). [*Id*. at 3-4 (citations omitted).]

The tribunal concluded that the provisions of MCL 211.27a(7)(*l*) do not apply if the entities are not involved in business activity.

## II. STANDARD OF REVIEW

Our review of the Tax Tribunal's decision is limited to determining "whether the tribunal erred in applying the law or adopted a wrong principle . . . ." *Moshier v Whitewater Twp*, 277 Mich App 403, 407; 745 NW2d 523 (2007). Further, to the extent that we must construe the meaning of a statute, our review is de novo. *Signature*

*Villas, LLC v Ann Arbor*, 269 Mich App 694, 699; 714 NW2d 392 (2006). Our goal in interpreting a statutory provision is to ascertain the Legislature's intent. *Cain v Waste Mgt, Inc (After Remand)*, 472 Mich 236, 245; 697 NW2d 130 (2005). This is accomplished by first examining the language used in the statute itself. *Id.* If the language is plain and unambiguous, then we must apply the statute as written. *Signature Villas*, 269 Mich App at 699. In those instances, judicial construction is neither necessary nor permitted. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

## III. ANALYSIS

Petitioner essentially argues that the transfer of the property from the Alice Trust to petitioner did not involve a "transfer of ownership" within the meaning of MCL 211.27a(6) because the transfer fell within the exception set forth in MCL 211.27a(7)(*l*). We disagree.

The Michigan Constitution and Michigan statutory law permit the taxable value of real property to be reassessed upon the sale or transfer of the property at the state equalized value for the calendar year following the assessment. Const 1963, art 9, § 3; MCL 211.27a(3); *Signature Villas*, 269 Mich App at 696-697. This is known as "uncapping" the taxable value. *Id*. at 697. Uncapping occurs whenever a transfer of ownership occurs. MCL 211.27a(3). "[T]ransfer of ownership" is "the conveyance of title to or a present interest in property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest." MCL 211.27a(6). The GPTA includes a nonexhaustive list of events that will constitute a transfer of ownership, MCL 211.27a(6), and events that do not constitute such a transfer, MCL 211.27a(7). The

uncapping of a parcel's taxable value typically results in a higher tax assessment, as was the case here.

There appears to be no dispute that the conveyance in this case is covered by the general rule in MCL 211.27a(6)(c), which provides:

> "[T]ransfer of ownership" means the conveyance of title to or a present interest in property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest. Transfer of ownership of property includes, but is not limited to, the following:
>
> * * *
>
> (c) A conveyance to a trust after December 31, 1994, except if the settlor or the settlor's spouse, or both, conveys the property to the trust and the sole present beneficiary or beneficiaries are the settlor or the settlor's trust, or both.

Accordingly, the conveyance was a transfer of ownership under MCL 211.27a(6)(c) unless one of the exceptions of MCL 211.27a(7) was applicable. Tax-exemption statutes are generally construed narrowly in favor of the taxing authority, and we generally defer to the tax tribunal's interpretation of a statute that it is charged with administering and enforcing. *Moshier*, 277 Mich App at 409.

Under MCL 211.27a(7)(*l*), transfer of ownership does not include

> [a] transfer of real property or other ownership interests among corporations, partnerships, limited liability companies, limited liability partnerships, or other legal entities if the entities involved are commonly controlled. Upon request by the state tax commission, a corporation, partnership, limited liability company, limited liability partnership, or other legal entity shall furnish proof within 45 days that a transfer meets the requirements of this subdivision.

The exception in MCL 211.27a(7)(*l*) applies if (1) the transaction is between legal entities and (2) the legal

entities involved are commonly controlled. Even assuming that trusts are legal entities within the meaning of the statute, the exception applies only if the legal entities are commonly controlled. MCL 211.27a does not define "commonly controlled." "A court may consult dictionary definitions when terms are not expressly defined by a statute." *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998). The term "common" is defined adjectivally as "belonging equally to, or shared alike by, two or more or all in question[.]" *Random House Webster's College Dictionary* (1997). "Commonly" is the adverb related to that meaning. "Control" means "to exercise restraint or direction over; dominate, regulate, or command." *Id*.

Petitioner argues that the trusts in this case are commonly controlled because they have the same trustees and that the tribunal erred by concluding that the trusts are not commonly controlled because RAB 1989-48 states that entities must be engaged in business activity in order to be commonly controlled. Even assuming, without deciding, that the tribunal erred by imposing a business-activity requirement, petitioner still cannot prevail because the Alice Trust and petitioner are not "commonly controlled" within the meaning of MCL 211.27a(7)(*l*). Statutory provisions must be read in the context of the entire statute. *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). The goal is to produce a harmonious whole. *CG Automation & Fixture, Inc v Autoform, Inc*, 291 Mich App 333, 338; 804 NW2d 781 (2011). Simply having the same trustee does not satisfy the statutory requirement because the statute does not look to a change in the property's managers, it looks for a change in the *ownership* of the property. A trustee manages trust property held in trust for the benefit of the trust beneficiaries. Although the

trustee has extensive control over the trust, he or she is ultimately liable to the beneficiaries. See MCL 700.7816 (listing the general powers of a trustee); MCL 700.7817 (listing specific powers of a trustee); MCL 700.7901 (listing remedies for a breach of trust by a trustee); MCL 700.7902 (noting that a trustee is liable to the trust beneficiaries for a breach of trust). Further, MCL 211.27a(6)(e) specifically provides that a transfer of ownership occurs if the beneficiaries of a trust are changed. There is no similar provision for when the trustees of a trust are changed because, quite simply, the trustees do not own the property.

Looking at MCL 211.27a(6), it is apparent that a transfer of ownership occurs when the property is transferred from one owner to a wholly new owner. Exceptions are made for transfers from a trust settlor when the settlor is the sole present beneficiary because ownership in that situation does not change. See MCL 211.27a(6)(c). Exceptions are also made for transfers of property that substitute the transferor for the transferor's spouse. See MCL 211.27a(6)(d), (e), and (f). The exceptions in MCL 211.27a(7) are similar in nature; they are triggered when property is transferred from one owner to a wholly new owner. Reading the statute as a whole, it is apparent that petitioner simply does not fall within the definition of "commonly controlled" by virtue of having the same trustees for both the transferring trust and the receiving trust. Thus, we conclude that the Alice Trust and petitioner are not commonly controlled and that the exception in MCL 211.27a(7)(*l*) does not apply.

Affirmed.

OWENS, P.J., and FITZGERALD and RIORDAN, JJ., concurred.

KARAUS v BANK OF NEW YORK MELLON

Docket No. 307842. Submitted December 12, 2012, at Grand Rapids. Decided December 20, 2012. Approved for publication March 19, 2013, at 9:05 a.m. Leave to appeal denied, 494 Mich ___.

Edward Karaus, doing business as Great Lakes Sea Walls, filed an action in the Allegan Circuit Court against the Bank of New York Mellon, PNC Bank, Sheldon Caref and Nelly Caref, seeking damages for breach of contract by the Carefs, asserting that all defendants were unjustly enriched by the improvements he made to the Carefs' property, and seeking to foreclose on a construction lien for work performed by plaintiff on that residential property. The court, Kevin W. Cronin, J., granted Mellon summary disposition on the construction lien claim, finding that the construction lien was not valid because the work had been performed on a residential property without a written contract as required by MCL 570.1114 of the Construction Lien Act (CLA), MCL 570.1101 *et seq*. The court concluded that there was no material issue of fact regarding whether the property was residential for purposes of the CLA. The court also granted summary disposition to Mellon on the unjust enrichment claim, concluding that plaintiff had another adequate legal remedy and that there was no evidence that Mellon had been enriched by the work performed by plaintiff on the house. Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 570.1114 provides that a construction lien for work performed on a residential structure is valid only if the contractor's work is completed pursuant to a written contract. The CLA defines "residential structure" as an individual residential condominium unit or a residential building containing not more than 2 residential units, the land on which it is or will be located, in which the owner or lessee contracting for the improvement is residing or will reside upon completion of the improvement. To qualify as a residential structure under the CLA, the owner or lessee of the property must intend to reside in the structure once construction is complete. In this case the trial court erred by granting Mellon summary disposition on the construction lien claim because there

was a genuine issue of material fact as to whether the Carefs intended to or did reside in the property.

2. To establish a claim of unjust enrichment the complaining party must establish (1) that the other party received a benefit from the complaining party and (2) that the complaining party would suffer an inequity if the other party retained the benefit. The trial court in this case properly dismissed plaintiff's unjust enrichment claim against Mellon. Plaintiff failed to present evidence that he conferred a benefit to Mellon. Rather, Mellon had only acquired an interest in the property as a third party through the assignment of the mortgage executed by the Carefs. There was no allegation or evidence that Mellon requested any of the work performed and Mellon's retention of any benefit to the property is not unjust.

Reversed in part, affirmed in part, and remanded for further proceedings.

MECHANICS' LIENS — CONSTRUCTION LIEN ACT — RESIDENTIAL STRUCTURE — INTENT TO RESIDE IN STRUCTURE.

Under MCL 570.1114 of the Construction Lien Act (CLA), MCL 570.1101 *et seq*., a construction lien for work performed on a residential structure is valid only if the contractor's work is completed pursuant to a written contract; the CLA defines "residential structure" as an individual residential condominium unit or a residential building containing not more than 2 residential units, the land on which it is or will be located, in which the owner or lessee contracting for the improvement is residing or will reside upon completion of the improvement; to qualify as a residential structure under the CLA, the owner or lessee of the property must intend to reside in the structure once construction is complete.

*R. J. Baker & Associates, PLLC* (by *Robert J. Baker*), for Edward Karaus, d/b/a Great Lakes Sea Walls.

*McClelland & Anderson, LLP* (by *Melissa A. Hagen*) and *Trott & Trott, P.C.* (by *Sarah Sleder*), for Bank of New York Mellon.

Before: HOEKSTRA, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM. In this construction lien and unjust enrichment case, plaintiff, Edward Karaus (doing busi-

ness as Great Lakes Sea Walls), appeals as of right the trial court's orders granting summary disposition in favor of defendant, Bank of New York Mellon (hereafter Mellon). For the reasons stated in this opinion, we affirm in part and reverse and remand in part for further proceedings consistent with this opinion.

This case revolves around plaintiff's efforts to receive compensation for construction work that he performed on a home owned by Sheldon and Nelly Caref (hereafter the Carefs), and commonly referred to as 1258 Fabun Road, located in Glenn, Michigan (hereafter "the property"). The Carefs purchased the property on March 19, 2004. In May 2004, plaintiff entered into an oral agreement with the Carefs to perform construction work on the property. Plaintiff continued to perform construction work on the property until 2006. Thereafter, between 2006 and 2009, plaintiff performed repair work on the property.

Plaintiff maintains that he was not paid in full for his work, and accordingly, on October 26, 2009, he recorded a construction lien. The claim of lien stated that plaintiff had first provided labor or materials for improvements to the property on May 1, 2004, and that plaintiff had last provided labor or materials on October 26, 2009. The lien stated that the contract amount was $405,000. Plaintiff acknowledged payment of $80,000, and accordingly claimed a construction lien upon the property in the amount of $325,000, plus $500 for the cost of the claim of lien for a total of $325,500 plus interest.

In July 2006, the Carefs refinanced their home loan. To do so, the Carefs borrowed $1,000,000 from Home Loan Corporation. The loan was secured by a mortgage encumbering the property in the same amount. The mortgage was recorded on June 5, 2007. The mortgage

was subsequently assigned to Mellon. At the time of the motion hearing, Mellon had not foreclosed on the mortgage.

On September 13, 2010, plaintiff filed a complaint against Mellon, PNC Bank,[1] and the Carefs. The complaint requested foreclosure of plaintiff's construction lien, alleged breach of contract against the Carefs only, and alleged unjust enrichment against all the parties. The Carefs did not respond to the complaint. On February 9, 2011, plaintiff filed a motion for entry of partial default judgment against the Carefs, and on June 2, 2011, the trial court entered an order for default judgment against the Carefs. The default judgment awarded a total of $356,511.73, with interest continuing to accrue, in favor of plaintiff.

On September 30, 2011, Mellon filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10) in regard to plaintiff's construction lien claim. In support of its motion, Mellon argued that plaintiff's claim of lien was invalid because plaintiff failed to provide work pursuant to a written contract. Mellon cited MCL 570.1114, which is part of the Construction Lien Act (CLA), MCL 570.1101 *et seq*., and provides that a contractor does not have a right to a construction lien on an interest in a residential structure unless the work was done pursuant to a written contract conforming to specific statutory requirements. In support of its contention that the property was residential, Mellon attached an affidavit executed by Sheldon Caref in which Sheldon averred that the property is residential, and that he and his wife "resided at the Property at different times between March 19, 2004 and 2009."

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[1] All the claims against PNC Bank have been resolved, and PNC Bank is not a party to this appeal.

Plaintiff filed a response to Mellon's motion for partial summary disposition regarding the construction lien claim on October 20, 2011. Plaintiff argued that the property was not residential because at the time he was first contacted about performing work on the property, the property was owned by NXS, LLC, (a company that is owned and controlled by Sheldon Caref), and that the property was clearly an investment property. Plaintiff further stated that neither the Carefs nor any person involved with NXS, LLC ever intended to reside on the property. Thus, plaintiff maintained that the property was commercial. In support of his position, plaintiff attached his affidavit disputing the accuracy of the statement in Sheldon Caref's affidavit. Specifically, plaintiff states that the property was not habitable at the time it was purchased by the Carefs and NXS, LLC, and that once the property became habitable it was rented by third parties, and thus was not occupied by the Carefs.

On October 3, 2011, Mellon filed a motion for partial summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) in regard to plaintiff's unjust enrichment claim. In support of its claim that summary disposition was proper, Mellon argued that plaintiff could not establish a prima facie case of unjust enrichment because Mellon did not receive a benefit from plaintiff and plaintiff had an adequate remedy at law. Plaintiff filed a brief in response, and argued that Mellon did receive a benefit because, but for plaintiff's improvements to the property, the entire area would have eroded and been uninhabitable. Plaintiff further argued that the legal remedy was not applicable.

The hearing regarding both motions for summary disposition was held on October 28, 2011. The parties presented arguments regarding the construction lien and

the unjust enrichment claims. The trial court rendered its decision on the record. Concerning the construction lien claim, the trial court granted summary disposition in favor of Mellon because it concluded that there was no material issue of fact regarding whether the property was residential. The trial court stated that it "accept[ed] the plaintiff's statement that the Carefs didn't occupy and use the property as a residence." However, the trial court found that the property was "occupied and used" by tenants, and that the fact that lessees had occupied and used the property as a residence rendered the property residential for purposes of the CLA. The trial court further noted that the language of the statute does not include a provision exempting residential properties that are only used by lessees. The trial court found that there was no written contract for services, and accordingly, found that Mellon was entitled to summary disposition because a construction lien on residential property is only valid if the work was done pursuant to a written contract. The trial court rejected plaintiff's argument that the letters between himself and the Carefs constituted a written contract, and found that at most it was a proposal from the Carefs to pay a certain amount for specified labor. The trial court further noted that the letters did not satisfy all the statutory requirements set forth in the CLA. Thus, the trial court stated that it was granting summary disposition pursuant to MCR 2.116(C)(8) and (C)(10).

In regard to the unjust enrichment claim, the trial court stated that summary disposition in favor of Mellon was proper because "there was an adequate legal remedy available to [plaintiff] and that finding and conclusion is decisive, pivotal in denying his unjust enrichment claim against [Mellon]." The trial court also stated that there was no "substantial factual foundation" regarding plaintiff's claim that the bank has been enriched. The trial court further elaborated, stating

that it was granting summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) on the unjust enrichment claim because there was no material issue of fact regarding whether the bank was enriched because the bank and the Carefs did not "stand in the same position."

After the trial court issued its opinions granting Mellon's motions for summary disposition, plaintiff filed two motions for reconsideration, one addressing the trial court's decision on the construction lien claim and one addressing the trial court's decision on the unjust enrichment claim. Relevant to the issues on appeal in this case, plaintiff attached several additional exhibits to support his claim that the property was commercial, not residential, to his motion for reconsideration in regard to the commercial lien claim. These additional exhibits consisted of affidavits from Norman Fautz, Diana Decker, and Donald Karaus, as well as an excerpt from the Saugatuck/Douglas Visitor's Guide. The visitor's guide showed a photograph of the deck built by plaintiff, ostensibly as part of an advertisement for rental properties. All three of the affiants stated that Sheldon Caref expressed a desire to "flip" the property and make a profit. The affiants further all indicated that the property was an investment property, and indicated that Sheldon never expressed any intent to reside at the property. The trial court denied plaintiff's motions for reconsideration, finding that plaintiff had presented the same issues already ruled on by the court and that plaintiff had failed to demonstrate a palpable error by which the court and parties were misled in regard to both motions.[2]

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[2] We note that Mellon argues that several exhibits submitted by plaintiff on appeal should not be considered by this Court in determining whether the trial court properly granted summary disposition in favor of

On appeal, plaintiff first argues that the trial court erred by granting summary disposition in favor of Mellon because the property at issue is not residential. We agree that the trial court erred, because fact questions exist that preclude summary disposition.

We review de novo a trial court's decision to grant summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id*. The evidence is viewed in the light most favorable to the nonmoving party. *Id*. at 567-568. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition pursuant to MCR 2.116(C)(8) is proper if the nonmoving party failed to state a claim on which relief can be granted. *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008). Claims must be "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. (quotation marks and citation omitted). In reviewing a trial court's decision to grant summary disposition pursuant to MCR 2.116(C)(8), we review the pleadings

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Mellon because those exhibits were not presented to the trial court at the time of the hearing on Mellon's motions for summary disposition and were instead submitted only with plaintiff's motion for reconsideration. Mellon is correct that this Court's review of a trial court's decision on a motion for summary disposition is limited to the evidence that was presented to the trial court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009). Thus, we will not consider any evidence submitted on appeal that was not before the trial court at the time of the motion hearing. We note that on appeal plaintiff does not challenge the trial court's denial of its motion for reconsideration.

alone, accepting all factual allegations in the complaint as true and construing them in a light most favorable to the nonmoving party. *Id*.

When a party moves the trial court for summary disposition pursuant to MCR 2.116(C)(10), the "moving party must specifically identify the matters that it believes have no disputed factual issues." *St Clair Med, PC v Borgiel*, 270 Mich App 260, 264; 715 NW2d 914 (2006); MCR 2.116(G)(4).[3] "The moving party must support its position with affidavits, depositions, admissions, or other documentary evidence." *Borgiel*, 270 Mich App at 264. If the moving party meets its burden of supporting its position that there is no factual dispute in regard to any relevant matter, the burden shifts to the opposing party to show that a genuine issue of material fact exists. *Id*. The opposing party must support its position with substantively admissible evidence proffered in opposition to the motion. *Maiden*, 461 Mich at 121. A "mere promise" that a claim may be supported by evidence produced at trial is insufficient to avoid summary disposition under MCR 2.116(C)(10). *Id*.

We also review de novo issues of statutory interpretation. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011). The goal of statutory interpretation is to discern the intent of the Legislature

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[3] MCR 2.116(G)(4) provides:

> A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

by examining the plain language of the statute. *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). If the language of the statute is clear and unambiguous, the Legislature is presumed to have intended the meaning plainly expressed, and judicial construction is not permitted. *Id*. at 247. "It is well settled that the CLA is remedial in nature, and 'shall be liberally construed to secure the beneficial results, intents, and purposes of [the] act.' " *DLF Trucking Inc v Bach*, 268 Mich App 306, 311; 707 NW2d 606 (2005), quoting MCL 570.1302(1). "Substantial compliance with the provisions of [the CLA] shall be sufficient for the validity of the construction liens provided for in [the CLA], and to give jurisdiction to the court to enforce them." MCL 570.1302(1). "[T]he CLA was enacted for the dual purposes of (1) protecting the rights of lien claimants to payment for expenses and (2) protecting property owners from paying twice for these expenses." *Bach*, 268 Mich App at 311.

Relevant in this case, the CLA limits a contractor's right to a construction lien in regard to work performed on residential structures. MCL 570.1114 provides:

> A contractor does not have a right to a construction lien on the interest of an owner or lessee in a residential structure unless the contractor has provided an improvement to the residential structure pursuant to a written contract between the owner or lessee and the contractor and any amendments or additions to the contract are also in writing. The contract required by this section shall contain a statement, in type no smaller than that of the body of the contract, stating all of the following:
>
> (a) That a residential builder or a residential maintenance and alteration contractor is required to be licensed under article 24 of the occupational code, 1980 PA 299, MCL 339.2401 to 339.2412. That an electrician is required to be licensed under the electrical administrative act, 1956 PA 217, MCL 338.881 to 338.892. That a plumbing contrac-

> tor is required to be licensed under the state plumbing act, 2002 PA 733, MCL 338.3511 to 338.3569. That a mechanical contractor is required to be licensed under the Forbes mechanical contractors act, 1984 PA 192, MCL 338.971 to 338.988.
>
> (b) If the contractor is required to be licensed to provide the contracted improvement, that the contractor is licensed and the contractor's license number.

Thus, to have a valid construction lien for work performed on residential structures, contractors must have performed those improvements pursuant to a written contract that satisfies the statutory requirements. "Residential structure" is defined by the CLA, MCL 570.1106(3), as "an individual residential condominium unit or a residential building containing not more than 2 residential units, the land on which it is or will be located, and all appurtenances, in which the owner or lessee contracting for the improvement is residing or will reside upon completion of the improvement."

This Court has not addressed the scope of the CLA's definition of "residential structure" in a situation analogous to this one. This Court has previously concluded that property owned by a building company was a "residential structure" despite the fact that the building company did not intend to reside on the property upon completion of a home being built on the property because a third party (the Johanneses) contracted with the building company to have a home built for them to reside in on the property. *Kitchen Suppliers, Inc v Erb Lumber Co*, 176 Mich App 602, 605, 608-609; 440 NW2d 50 (1989). This Court explained that the property was residential as defined by the CLA despite the fact that the building company that owned the property did not intend to reside on the property because the Johanneses, "by virtue of their executory contract with [the building company] to purchase the property upon

completion of the house, were 'lessees'[4] as defined by the [CLA]." *Id*. at 609. This Court held that the house was a "residential structure" as defined by the CLA because "the Johanneses intended to, and did, reside in the house upon its completion." *Id*.

In *Titanus Cement Wall Co, Inc v Watson*, 158 Mich App 210, 217; 405 NW2d 132 (1987), this Court held that a single family residence was not a residential structure within the meaning of the CLA because the owner who contracted for the improvements to the home did not intend to reside in it upon its completion. This Court noted that it did not matter that a single family home would ordinarily be considered a residential structure because the statute's definition superseded the dictionary definition. *Id*.

Thus, on the basis of the plain language of the statute and this Court's interpretation and application of the CLA's definition of residential structure, the determining factor in regard to whether a property constitutes a residential structure or a commercial property is whether the owner or lessee contracting for the improvement *intends* to actually reside on the property on completion of construction. *Kitchen Suppliers*, 176 Mich App at 609; *Titanus Cement Wall Co, Inc*, 158 Mich App at 217. Thus, intent to reside in a structure is a prerequisite to that structure being a residential structure for purposes of the CLA.

In this case, the trial court found that there was no material issue of fact regarding whether the property was residential. The trial court stated that it "accept[ed] plaintiff's statement that the Carefs didn't occupy and use the property as a residence." However,

[4] Lessee is defined as "a person, other than the owner, who holds an interest, other than a security interest, in real property." MCL 570.1105(1).

the trial court found that the property was "occupied and used" by tenants, and that pursuant to this Court's decision in *Kitchen Suppliers*, the fact that lessees occupied and used the property as a residence rendered the property residential for purposes of the CLA.

We conclude that the trial court erred by granting summary disposition because there is a genuine issue of material fact in regard to whether the Carefs intended to or did reside on the property. Mellon, the moving party, presented an affidavit executed by Sheldon Caref wherein he stated that he and his wife "resided at the property at different times between March 19, 2004 and 2009" in support of its contention that the property is a "residential structure." Plaintiff, the opposing party, responded with an affidavit of his own stating that as soon as the property was habitable, the Carefs rented it out. Plaintiff further averred that the property was purchased by a company, and that it clearly appeared to be an investment property. Thus, plaintiff rebutted Mellon's evidence of the Caref's intent to reside in the property with evidence suggesting that the Carefs did not reside in the property, and in doing so established that there was a genuine issue of material fact for trial in regard to the Caref's intended use of the property. *Maiden*, 461 Mich at 121; *Borgiel*, 270 Mich App at 264.

The fact that there is a genuine issue of material fact is further underscored by the trial court's conclusion that it "accept[ed] plaintiff's statement that the Carefs didn't occupy and use the property as a residence." The trial court engaged in impermissible fact-finding when it concluded that the Caref's did not occupy and use the property as a residence. Further, the trial court's reason for granting summary disposition in favor of Mellon despite its finding that the property was never occupied by the Carefs, was a misapplication of the law. The trial

court concluded that summary disposition in favor of Mellon was required even though it had found that the Carefs never resided in the property. Relying on this Court's decision in *Kitchen Suppliers*, the Court concluded that because the lessees occupied and used the property as a residence, the property qualified as residential for purposes of the CLA. However, contrary to the trial court's decision, the *Kitchen Suppliers* case did not hold that a property is residential if it is occupied by lessees who use it as a residence. Rather, as discussed earlier, the *Kitchen Suppliers* case held that property owned by a company that did not intend to reside in the property still qualified as residential under the CLA because the company had a contract with a third party who in turn had contracted with the property owner to have a home built on the property in which the third party intended to reside. Thus, unlike this case, the third-party "lessees" in *Kitchen Suppliers* contracted for improvement to the property and intended to permanently reside on the property upon completion of the contracted-for improvements.

Next, plaintiff argues that the trial court erred by ruling that he failed to establish a prima facie case of unjust enrichment and also that the trial court erred by determining that plaintiff's unjust enrichment claim was barred because he had an adequate legal remedy.

Whether a claim for unjust enrichment can be maintained is a question of law that we review de novo. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006). Trial court rulings regarding equitable matters are also reviewed de novo. *Id*.

A claim of unjust enrichment requires the complaining party to establish (1) the receipt of a benefit by the other party from the complaining party and (2) an

inequity resulting to the complaining party because of the retention of the benefit by the other party. *Id*. at 195. If plaintiff in this case can establish that Mellon has been unjustly or inequitably enriched at its expense, the law will imply a contract to prevent the unjust enrichment. *Id*. Not all enrichment is unjust in nature, and the key to determining whether enrichment is unjust is determining whether a party unjustly received and retained an independent benefit. *Id*. at 196.

"One is not unjustly enriched . . . by retaining benefits involuntarily acquired which law and equity give him absolutely without any obligation on his part to make restitution." *Tkachik v Mandeville*, 487 Mich 38, 48; 790 NW2d 260 (2010) (quotation marks omitted), quoting *Buell v Orion State Bank*, 327 Mich 43, 56; 41 NW2d 472 (1950). Our Supreme Court explained that unjust enrichment describes "the result or effect of a failure to make restitution of or for property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor." *Buell*, 327 Mich at 56 (quotation marks and citation omitted).

An examination of the elements of unjust enrichment is dispositive of whether plaintiff has established his unjust enrichment claim. Again, in order to establish a claim of unjust enrichment, plaintiff must demonstrate: (1) the receipt of a benefit by the other party from the complaining party and (2) an inequity resulting to the complaining party because of the retention of the benefit by the other party. *Morris Pumps*, 273 Mich App at 195. Turning to the first element, plaintiff has not shown that he conferred a benefit to Mellon, because Mellon acquired its interest in the property through the assignment of the mortgage executed by the Carefs, not through any action of plaintiff. Thus, there was no

receipt of a benefit by Mellon from plaintiff. As stated by this Court in *Morris Pumps*, 273 Mich App at 196, quoting 66 Am Jur 2d, Restitution and Implied Contracts, § 32, p 628:

> A third party is not unjustly enriched when it receives a benefit from a contract between two other parties, where the party benefited has not requested the benefit or misled the other parties . . . . Otherwise stated, the mere fact that a third person benefits from a contract between two other persons does not make such third person liable in quasi-contract, unjust enrichment, or restitution. Moreover, where a third person benefits from a contract entered into between two other persons, in the absence of some misleading act by the third person, the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third person.

Therefore, we conclude that Mellon has not received a benefit *from* plaintiff because if anything, Mellon has merely received the benefit from the contract between plaintiff and the Carefs.

Turning to the second element, to the extent that Mellon has retained a benefit from the work plaintiff performed on the property, it received that benefit only as a third party to the agreement between plaintiff and the Carefs. There is no allegation or evidence to support the contention that Mellon requested any of the work performed by plaintiff or misled plaintiff to receive any benefit. Further, there is no evidence that Mellon ever gave any assurance that it would pay for the work completed by plaintiff, nor that it was even aware of the work as it was being performed. In light of the fact that Mellon was completely uninvolved with any negotiations that had occurred before the work on the property was commenced, it cannot be said that any benefit Mellon does retain is unjust. Further, it is not clear that Mellon has even benefitted from plaintiff's labor be-

cause Mellon has not yet foreclosed on the property and merely retains a mortgage interest. Therefore, the trial court properly granted summary disposition in favor of Mellon in regard to plaintiff's unjust enrichment claim.[5]

Affirmed in part and reversed and remanded in part for further proceedings consistent with this opinion. We do not retain jurisdiction.

HOEKSTRA, P.J., and BORRELLO and BOONSTRA, JJ., concurred.

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[5] In light of our conclusion that Mellon was not unjustly enriched by plaintiff, we need not consider whether plaintiff lacks an adequate legal remedy because Mellon is not liable to plaintiff regardless of whether plaintiff's legal remedy is adequate.

PEOPLE v GUAJARDO

Docket No. 306213. Submitted October 2, 2012, at Lansing. Decided March 19, 2013, at 9:10 a.m.

Juan M. Guajardo, Jr., was convicted by a jury in the Saginaw Circuit Court, Robert L. Kaczmarek, J., of second-degree murder, possession of a firearm by a felon, and two counts of possession of a firearm during the commission of a felony. He appealed, alleging that the court erred when it refused to instruct the jury on the affirmative defense of self-defense and the defense of others.

The Court of Appeals *held*:

1. A defendant asserting an affirmative defense must produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding the affirmative defense.

2. The Self-Defense Act (SDA), MCL 780.971 *et seq*., codified the circumstances in which a person may use deadly force in self-defense or in defense of another person without having the duty to retreat. The SDA requires that a person have an honest and reasonable belief that there is a danger of death, great bodily harm, or sexual assault in order to justify the use of deadly force. MCL 780.972(1). The SDA also provides that an individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force. MCL 780.972(1). The SDA does not diminish an individual's right to use deadly force or force other than deadly force in self-defense or defense of another person as provided by the common law of Michigan on October 1, 2006, the effective date of the act.

3. At common law, felons in possession of a firearm were not precluded from asserting self-defense if the defense was supported by sufficient evidence, i.e., evidence that the defendant's criminal possession of a firearm was justified because the defendant honestly and reasonably believed that his or her life was in imminent danger and that it was necessary to exercise force to protect himself or herself. The Legislature did not alter the availability of self-defense under the SDA for felons possessing firearms.

4. A felon possessing a firearm is not precluded from raising self-defense under the SDA when there is evidence that would

allow a jury to conclude that criminal possession of a firearm was justified because the accused had an honest and reasonable belief that the use of deadly force was necessary to prevent imminent death, great bodily harm, or sexual assault to the accused or to another.

5. There was no evidence that would have allowed a jury to find that defendant's criminal possession of the firearm was justified by an honest and reasonable belief that it was necessary for him to use deadly force to prevent imminent death or great bodily harm to himself or to another. The reasonableness of a person's belief regarding the necessity of deadly force depends on what an ordinarily prudent and intelligent person would do on the basis of the perceptions of the actor. An ordinarily prudent and intelligent person would not have found defendant's belief regarding the use of deadly force reasonable. The use of deadly force by defendant was not reasonable because threats of future harm do not constitute imminent danger for purposes of self-defense. Defendant was the aggressor who initiated the deadly confrontation and he was not entitled to a self-defense instruction.

6. Defendant did not advance a self-defense theory at trial but instead claimed that the shooting was an accident. The trial court did not abuse its discretion when it instructed the jury consistently with defendant's accident theory but declined to provide a self-defense instruction.

Affirmed.

1. CRIMINAL LAW — JURY INSTRUCTIONS — AFFIRMATIVE DEFENSES.

A defendant asserting an affirmative defense must produce some evidence on all elements of the defense before a trial court must instruct the jury regarding the affirmative defense.

2. CRIMINAL LAW — AFFIRMATIVE DEFENSES — FELON IN POSSESSION OF A FIREARM — SELF-DEFENSE ACT — COMMON LAW.

Felons in possession of a firearm were not precluded under the common law from asserting the affirmative defense of self-defense if the defense was supported by sufficient evidence; the Legislature did not alter the availability of self-defense under the Self-Defense Act for felons possessing firearms (MCL 750.224f; MCL 780.971 *et seq*.).

3. CRIMINAL LAW — AFFIRMATIVE DEFENSES — FELON IN POSSESSION OF A FIREARM — SELF-DEFENSE ACT.

A felon possessing a firearm is not precluded from raising the affirmative defense of self-defense under the Self-Defense Act

when there is evidence that would allow a jury to conclude that criminal possession of the firearm was justified because the accused had an honest and reasonable belief that the use of deadly force was necessary to prevent imminent death, great bodily harm, or sexual assault to the accused or to another (MCL 750.224f; MCL 780.972[1]).

4. CRIMINAL LAW — SELF-DEFENSE — DEADLY FORCE.

The reasonableness of a person's belief regarding the necessity of using deadly force in self-defense or the defense of another depends on what an ordinarily prudent and intelligent person would do on the basis of the perceptions of the actor.

5. CRIMINAL LAW — SELF-DEFENSE — THREATS OF FUTURE HARM.

Threats of future harm do not constitute imminent danger for purposes of the affirmative defense of self-defense.

*Bill Schuette*, Attorney General, *John J. Bursch*, Solicitor General, *Michael D. Thomas*, Prosecuting Attorney, and *Randy L. Price*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Peter Jon Van Hoek*) for defendant.

Before: RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ.

BORRELLO, J. Defendant appeals as of right his convictions by a jury of second-degree murder, MCL 750.317, possession of a firearm by a felon, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to 25 to 40 years' imprisonment for the second-degree murder conviction, 5 years to 90 months in prison for the conviction of possession of a firearm by a felon, and 2 years' imprisonment for each felony-firearm conviction. For the reasons set forth in this opinion, we affirm.

I. FACTS

Defendant's convictions arise out of the shooting death of Kevin Powell that occurred about December 17, 2010. The shooting occurred at a boarding house in Saginaw that defendant had signed a contract to purchase a few days earlier. Powell, who was a large, heavyset man, was a tenant at the boarding house. Several days before the shooting, the police refused a request from a man named "Juan" for assistance in evicting Powell because "Juan" could not produce a valid eviction notice. A police officer testified that he told "Juan" to call the police if the subject, i.e., Powell, became "assaultive." The officer testified that "Juan" responded by stating that no call would be necessary because "he takes care of his own." Defendant testified that his friend had made the call and impersonated defendant.

At trial, evidence showed that defendant and Powell engaged in several verbal altercations in the months and days preceding the shooting. Defendant testified that he initially met Powell in the parking lot of a grocery store where he and Powell argued and Powell allegedly stated, "I'll go get my gun and I'll find out who you are." The verbal altercations continued after defendant purchased the boarding house. Defendant testified that Powell was angry that defendant planned to evict all the residents of the boarding house. According to defendant, Powell refused to vacate the boarding house without a refund of his past rent and he allegedly stated, "we shoot cops over here . . . you ain't s--- to me."

Before the shooting, defendant, Delano Williams, and John O'Valle moved some of defendant's belongings, including a rifle, into the boarding house. According to defendant, early in the day Powell shouted at him.

Defendant refused to have a conversation with Powell until Powell stopped shouting. Powell retreated to his room. Later that day, defendant and Powell had a calm discussion; Powell offered to talk and have an alcoholic drink with defendant in his room provided that defendant purchase the alcohol. Defendant agreed, and left the boarding house to purchase alcohol. There was conflicting testimony regarding the events that followed.

According to Williams, after defendant left the boarding house to buy alcohol, O'Valle and Powell got into an argument. O'Valle became angry and retrieved defendant's rifle, which had been placed in a back bedroom. As O'Valle carried the rifle down a hallway toward Powell's room, Powell confronted O'Valle and took the rifle away from him. Powell brought the rifle into his room.

Following the dispute between O'Valle and Powell, according to Williams, he and Powell quarreled over Williams' missing watch. Williams explained that the incident occurred in Powell's room and he stated that Powell started to choke him. Williams testified that while Powell was choking him, defendant returned from the store, and that Powell released Williams when he saw defendant approach. Williams stated that defendant went and "got the rifle back" about 10 to 25 minutes after Powell choked him. Specifically, Williams testified that defendant went into Powell's room, and, following a conversation, Powell handed the rifle back to defendant and told defendant to "control his peoples."

Williams testified that after defendant retrieved the rifle from Powell, defendant placed it in a back bedroom underneath a mattress. According to Williams, sometime thereafter, while he and O'Valle sat at a table,

defendant got the rifle from underneath the mattress, walked to Powell's room, knocked on the door, asked Powell if he wanted some soup, and then fired the gun. Specifically, Williams explained, "I heard the door go, you know, like somebody touched the knob and gonna pull it open and then just heard a bang." Williams was unclear about the timing regarding when defendant stowed the rifle under the mattress after Powell gave it back to him and the time when defendant got the rifle back out from under the mattress and shot Powell. At one point, Williams stated that the shooting occurred about an hour after defendant placed the rifle under the mattress. Williams did not clarify why defendant confronted Powell with a rifle other than stating that Powell "went too far when he decided he wanted to touch me" and that Powell was "too big." He agreed that defendant "got up from the table" unannounced, got the rifle, and went to Powell's room with it.

Defendant's testimony differed from Williams' testimony. Defendant testified that, when he returned to the boarding house from purchasing alcohol, he witnessed Powell laying over O'Valle holding a rifle. Defendant stated that Powell brought the rifle into his room. Defendant went into Powell's room and conversed and drank alcohol with Powell for approximately 15 minutes then arose to leave the room. Powell handed the rifle to defendant as he left the room.

According to defendant, sometime after he and Powell conversed, while he was eating with O'Valle, he heard a "ruckus in the kitchen" and then saw Powell choking Williams. Defendant explained that he instructed Powell to release Williams and Powell complied. However, defendant testified that Powell stated, "that's it . . . I'm getting my gun. I'm killin' all of yous. . . . He said he was gonna kill us." Powell left the

area and returned to his room. Defendant testified that, as Powell was going to his room, "I went under the mattress and retrieved the gun and flashes of my dead sister was in the kitchen, and I'm seeing flashes of [Williams] dead in the kitchen, and I'm figuring he's gonna come kill us all." Defendant testified that he retrieved the rifle about three minutes after Powell went into his room. Defendant then proceeded to Powell's room with the rifle. Defendant stated that he asked Powell if he wanted some food and proceeded through the door into Powell's room. Defendant testified as follows:

> I was scared that I was going to catch a bullet, you know, through the door, and then when I went into the bedroom, I was what the hell is wrong with you. And then he saw the gun in my hand. He says I got a gun too, mother f-----. And I says well you better not move.
>
> * * *
>
> . . . And that's when he moved this hand. He had something in his hand right here. But I figured he had two guns. And he moved this hand. As he moved, I stepped back and I brought the gun up like this. Now the door is in between halfway him and me. And at the same time when I brought it like this, after he moved, the gun just went off. I mean, it don't just go off, but I don't remember squeezing the trigger. It just happened so fast. And, I mean, I didn't aim for him.

Defendant testified that he was scared of "gettin' killed." He explained that Powell was holding a "long black thing" that looked like the barrel of a gun when he went in Powell's room. However, defendant testified that Powell was "bluffing" and must have been holding a hammer that the police later found on his bed. Defendant testified that his rifle fired only once and he stated that he was "shocked that it went off. I actually

thought that it was empty." He explained that he brought what he thought was an unloaded rifle to Powell's room to try and intimidate Powell and prevent him from "get[ting] his gun and kill[ing] all three of us like he said he was gonna do." Defendant agreed with the prosecution that his "sworn testimony to this jury was that this was an accident taking place at a time that you were in fear for your life." Defendant testified that, immediately after the shooting, he concluded that Powell was dead and he, Williams, and O'Valle placed some belongings and the rifle into a wheelbarrow and fled to a home nearby.

The police were called to the boarding house the following day, where they discovered Powell's body covered with some bedding. The police found a hammer on Powell's bed and a spent shell casing on the floor near the door next to Powell's room. Shortly thereafter, the police arrested defendant.

At the close of proofs, defense counsel requested an instruction on self-defense and the defense of others, but the trial court denied defendant's request and explained:

> With regard to the self-defense claim here, what little research we can do on this matter, there's the idea of accidental self-defense . . . you have to have a rational view of the facts to support this.
>
> In this case, the defendant has testified that the gun accidentally went off. It wasn't his intent to kill the person. He went there with the weapon because of the position he was in because he was frightened but the gun accidentally went off. So the very nature of discharging a firearm in defense of himself or others would not apply, and the fact that he went to the decedent's room would negate it anyway. I believe that more importantly his statement that the gun accidentally discharged would eliminate any claim

> that this discharge was with the intent to defend himself or someone else, so I'm not going to give the instruction.

The trial court instructed the jury on the defense of accident. The jury convicted defendant as set forth above. This appeal ensued.

## II. STANDARD OF REVIEW

Defendant contends that the trial court denied him his right to a fair trial when it refused to instruct the jury on self-defense and defense of others.

We review questions of law arising from the provision of jury instructions de novo. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). However, we review a trial court's determination whether a jury instruction is applicable to the facts of a case for an abuse of discretion. *Id*. "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). "The defendant bears the burden of establishing that the asserted instructional error resulted in a miscarriage of justice." *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). To the extent that we must interpret and apply relevant statutes, issues of statutory construction involve questions of law that we review de novo. *People v Ryan*, 295 Mich App 388, 400; 819 NW2d 55 (2012).

## III. ANALYSIS

### A. GOVERNING LAW

"A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). "A defendant asserting an affirma-

tive defense[1] must produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding the affirmative defense." *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998).

Under the common law, the affirmative defense of self-defense justified the killing of another person if the defendant " 'honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself.' "[2] *Dupree*, 486 Mich at 707, quoting *People v Riddle*, 467 Mich 116, 127; 649 NW2d 30 (2002). In general, a defendant does not act in justifiable self-defense when he or she uses excessive force or when the defendant is the initial aggressor. *Id*.

In 2006, the Legislature enacted the Self-Defense Act (SDA), MCL 780.971 *et seq*. Effective October 1, 2006, the SDA "codified the circumstances in which a person may use deadly force in self-defense or in defense of another person without having the duty to retreat." *Dupree*, 486 Mich at 708. Specifically, the SDA modified the common law's duty to retreat that was imposed on individuals who were attacked outside their own home or were not subjected to a "sudden, fierce, and violent" attack. *People v Conyer*, 281 Mich App 526, 530 n 2; 762 NW2d 198 (2008). However, the SDA continues to require that a person have an honest and reasonable belief that there is a danger of death, great bodily harm,

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[1] "An affirmative defense is one that admits the doing of the act charged, but seeks to justify, excuse, or mitigate it . . . . It does not negate selected elements or facts of the crime." *People v Lemons*, 454 Mich 234, 246 n 15; 562 NW2d 447 (1997) (quotation marks and citations omitted).

[2] At common law, a person could also use deadly force in defense of others under similar circumstances. See *People v Kurr*, 253 Mich App 317, 321; 654 NW2d 651 (2002).

or a sexual assault in order to justify the use of deadly force. MCL 780.972(1). The statute provides, in relevant part, as follows:

> (1) *An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force* may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:
>
> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.
>
> (b) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent sexual assault of himself or herself or of another individual. [MCL 780.972(1) (emphasis added).]

At the outset we note that a key provision of the statutory language set forth above is that portion which provides "[a]n individual who has not *or is not engaged in the commission of a crime* at the time he or she uses deadly force may use deadly force . . . ." (Emphasis added.) This language raises the question whether a felon possessing a firearm is precluded from asserting self-defense under the SDA. Indeed, in this case, defendant was a convicted felon and was precluded from possessing a firearm under MCL 750.224f at the time of the shooting. Therefore, when defendant possessed the rifle used in the shooting, he was a felon in possession of a firearm contrary to that statute. Accordingly, we must proceed by determining whether a felon in possession of a firearm is precluded from asserting the affirmative defense of self-defense under the SDA.

There is no published caselaw addressing the interplay between the statute proscribing the possession of a firearm by a felon and the SDA; thus, we must first turn

to the plain language of the statutes. MCL 750.224f provides that an individual convicted of a felony may not "possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm," unless certain conditions are satisfied. See *People v Perkins*, 473 Mich 626, 630-632; 703 NW2d 448 (2005). The statute includes an exemption applicable to felons who have been pardoned or have had their felonies expunged or set aside. MCL 750.224f(4). However, the statute is silent with respect to affirmative defenses.

With respect to the SDA, as noted, the statute articulates when an individual may use deadly force in self-defense or defense of others with no duty to retreat, MCL 780.972(1), but it too is silent on whether the statute applies to felons possessing firearms. Importantly, however, the SDA provides: "This act *does not diminish an individual's right to use deadly force* or force other than deadly force in self-defense or defense of another individual *as provided by the common law* of this state in existence on October 1, 2006." MCL 780.974 (emphasis added). Thus, in order to resolve whether a felon in possession of a firearm is precluded from asserting self-defense under the SDA, we must proceed by examining the scope of an individual's right to assert self-defense at common law.

In *Dupree*, 486 Mich at 696-697, our Supreme Court addressed whether a convicted felon could assert common-law self-defense to justify his temporary possession of a firearm in violation of the statute prohibiting possession of a firearm by a felon. In that case, the defendant was at a house party with a female companion when he became involved in an altercation with another man, Damond Reeves, on the porch. *Id*. at 697-698. Testimony showed that the altercation escalated into a physical brawl. *Id*. at 698. As the two men

wrestled on the ground, the defendant saw that Reeves had a gun in the waistband of his pants. *Id*. The defendant testified that he was afraid for his life because Reeves was larger than him, intoxicated, and armed. *Id*. at 698-699. The defendant testified that he shot Reeves three times as he struggled with Reeves for the gun. *Id*. at 699. The defendant then fled the scene with the gun, tossing it out of the window of his companion's vehicle after she had driven them away from the house. *Id*.

The prosecution charged the defendant with assault with intent to commit murder, felonious assault, possession of a firearm by a felon, and felony-firearm. *Id*. at 697-698. At trial, the defendant claimed self-defense and he argued that his temporary possession of the gun was justified because he seized it only to protect himself during the scuffle. *Id*. at 699. The trial court provided a standard self-defense instruction; however, with respect to the felon-in-possession charge, the court provided a "momentary innocent possession" instruction. *Id*. at 699-700. The jury acquitted the defendant of all the charges except the felon-in-possession charge and the defendant appealed. *Id*. at 700.

This Court reversed the defendant's conviction and remanded for a new trial, finding that common-law self-defense was available for a charge of being a felon in possession of a firearm and that the trial court had erred by failing to instruct the jury accordingly. *People v Dupree*, 284 Mich App 89, 92, 104; 771 NW2d 470 (2009) (opinion by M. J. KELLY, J.). Writing for the majority, Judge M. J. KELLY reasoned that "the Legislature's enactment of MCL 750.224f must be construed against the background of Anglo-Saxon common law, which includes the defenses of duress and self-defense." *Id*. at 103. Judge M. J. KELLY noted the purpose behind the

felon-in-possession statute "is to ensure that those persons who are more likely to misuse firearms do not maintain ready possession of them." *Id*. at 106. However, Judge M. J. KELLY declined to presume that by enacting the statute, "the Legislature intended to deprive persons—even ex-felons—of the fundamental right to defend against a sudden and potentially deadly attack." *Id*. at 104, citing *United States v Panter*, 688 F2d 268, 271 (CA 5, 1982) ("We do not believe that Congress intended to make exfelons [sic] helpless targets for assassins."). Judge M. J. KELLY concluded, "[b]ecause there is no indication that the Legislature intended to abrogate or modify the application of traditional common-law affirmative defenses to MCL 750.224f, I conclude that the defenses of duress and self-defense are still applicable to a charge of being a felon-in-possession." *Dupree*, 284 Mich App at 104.

Our Supreme Court affirmed this Court's result,[3] holding that common-law self-defense "is generally available for a felon-in-possession charge *if supported by sufficient evidence*." *Dupree*, 486 Mich at 697 (emphasis added). The Court reasoned that self-defense was "embedded in our criminal jurisprudence," and presumed that the defense was available for felons possessing firearms "[a]bsent some clear indication that the Legislature abrogated or modified" the availability of the defense. *Id*. at 705-706. Importantly, though, the defense was available only if it was supported by sufficient evidence—i.e., evidence that the defendant's "criminal possession of the firearm was justified because defendant honestly and reasonably believed that his life was

[3] Our Supreme Court did not affirm this Court's holding that the affirmative defense of duress was available to a felon-in-possession charge because the defense was not properly raised in the trial court. *Dupree*, 486 Mich at 696-697, 703.

in imminent danger and that it was necessary for him to exercise force to protect himself." *Id*. at 708. The Court concluded that the defendant had introduced evidence to support that he possessed the gun in self-defense. *Id*. at 708-709.

*Dupree* clearly establishes that at common law, felons in possession of a firearm were not precluded from asserting self-defense if the defense was supported by sufficient evidence. The Legislature did not alter the availability of self-defense under the SDA for felons possessing firearms. Rather, the SDA explicitly states that the statute "*does not diminish an individual's right to use deadly force* or force other than deadly force in self-defense or defense of another individual *as provided by the common law* of this state in existence on October 1, 2006." MCL 780.974 (emphasis added). Therefore, we hold that a felon possessing a firearm is not precluded from raising self-defense under the SDA when there is evidence that would allow a jury to conclude that criminal possession of a firearm was justified because the accused had an honest and reasonable belief that the use of deadly force was necessary to prevent imminent death, great bodily harm, or sexual assault to himself or herself or to another. See *Dupree*, 486 Mich at 708-709; MCL 780.972(1).[4]

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[4] We note that the temporal relationship between the time the accused came into possession of the firearm and the time he or she deployed deadly force is relevant to determining whether the accused had an honest and reasonable belief that possession of a firearm was justified to prevent imminent death, great bodily harm, or sexual assault. For example, in *Dupree*, 486 Mich at 708-709, a self-defense instruction was warranted when there was evidence that the defendant struggled with an armed individual for possession of the gun and then possessed the gun for a short period thereafter until the threat of danger subsided. Thus, both the amount of time an accused possessed a firearm and the manner in which an accused came into possession of the firearm can be part of a totality-of-the-circumstances inquiry into whether there is evidence that

B. APPLICATION

Having concluded that a felon possessing a firearm is not precluded from asserting self-defense under the SDA if the defense is supported by evidence, we now turn to whether, in this case, self-defense was supported by the evidence.

After a thorough review of the record, we conclude that there was no evidence that would have allowed a jury to find that defendant's criminal possession of the rifle was justified by an honest and reasonable belief that it was necessary for him to use deadly force to prevent imminent death or great bodily harm to himself or to another.[5] MCL 780.972(1). Here, unlike in *Dupree*, defendant was not involved in a physical struggle with an intoxicated and armed individual. Instead, defendant pursued Powell into his room and shot him after Powell had abandoned the physical altercation with Williams and retreated into his room, a place where he had a legal right to be. Specifically, evidence showed that several physical and verbal altercations preceded the shooting. O'Valle confronted Powell with the rifle, Williams accused Powell of taking his watch, and defendant informed Powell that he would soon be evicted. Despite the contentious nature of the relationship between the men, Powell never produced a weapon or placed any of the men in danger of imminent death or great bodily harm. Indeed, when O'Valle threatened Powell with defendant's rifle, Powell physically took the

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a felon's possession of a firearm was justified because the felon honestly and reasonably believed that the use of deadly force was necessary to prevent imminent death, great bodily harm, or sexual assault.

[5] It was not alleged, and there was no evidence, that there was any danger of sexual assault; thus, our analysis is limited to whether defendant had a reasonable and honest belief of imminent death or great bodily harm.

weapon from him but he did not threaten anyone with it. Instead, Powell returned the rifle to defendant without incident. It was defendant, not Powell, who used the rifle as a deadly weapon.

Additionally, although defendant testified that he feared for his life, there was no evidence that defendant had a reasonable and honest belief that the use of deadly force was necessary to prevent imminent death or great bodily harm. *Dupree*, 486 Mich at 707. The reasonableness of a person's belief regarding the necessity of deadly force "depends on what an ordinarily prudent and intelligent person would do on the basis of the perceptions of the actor." *People v Orlewicz*, 293 Mich App 96, 102; 809 NW2d 194 (2011). In this case, considering all the facts and circumstances, an ordinarily prudent and intelligent person would not have found it reasonable to pursue Powell to his room, coax him to open the door by offering him food, and then shoot him. According to defendant, Powell and Williams were in a physical altercation a minimum of three minutes before the shooting. During this altercation, Powell did not possess any weapon and he did not pose a deadly threat to either defendant or Williams. In fact, according to defendant, when defendant put his hand on Powell's shoulder and told him to release Williams, Powell did so and then retreated to his room and closed the door. Although defendant testified that Powell threatened to get his gun and kill all three men, Powell returned to his room and closed the door and did not come back out of the room. Despite defendant's contrary claims, the use of deadly force was not necessary because threats of future harm do not constitute imminent danger for purposes of self-defense. See, e.g., *People v Truong (After Remand)*, 218 Mich App 325, 337-338; 553 NW2d 692 (1996). Once Powell abandoned the physical altercation and retreated to his room and

closed the door, he did not pose an imminent threat to defendant or anyone else in the boarding house in such a manner that the use of deadly force was necessary. Nevertheless, defendant retrieved a rifle from under a mattress in a back bedroom, waited three minutes, went to Powell's room, offered Powell food, and then immediately shot Powell. Indeed, according to his own testimony, defendant did not think the rifle was loaded when he brought it to Powell's room. Had defendant possessed a reasonable and honest belief that his life was in danger, he would not have brought what he thought was an unloaded rifle to Powell's room to confront him. In sum, defendant was the aggressor who initiated the deadly confrontation and he was not entitled to a self-defense instruction.

Moreover, defendant did not advance a self-defense theory at trial. While defendant correctly claims that a criminal defendant can assert inconsistent defenses, *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997), all defenses must be supported by evidence. *Crawford*, 232 Mich App at 619. In this case, a self-defense theory of defense was not supported by any evidence. "A finding that a defendant acted in justifiable self-defense necessarily requires a finding that the defendant acted intentionally, but that the circumstances justified his actions." *People v Heflin*, 434 Mich 482, 503; 456 NW2d 10 (1990). At trial, defendant did not maintain that he intentionally shot Powell in self-defense. Rather, defendant maintained that the shooting was an accident. Specifically, defendant testified that he thought the rifle was unloaded when he brought it to Powell's room and he stated that he was "shocked" that the gun fired. Defendant testified, "I actually thought that it was empty." Defendant explained that he brought what he thought was an unloaded gun to Powell's room in an effort to intimidate him. Defendant

explained how the gun fired as follows: "I brought the gun up like this. . . . And at the same time . . . the gun just went off. I mean, it don't just go off, but I don't remember squeezing the trigger. It just happened so fast." In addition, defendant testified that he did not aim for Powell, and he agreed with the prosecution that his "sworn testimony to this jury was that *this [shooting] was an accident* taking place at a time that you were in fear for your life." (Emphasis added.) Thus, based on defendant's own testimony, there were only two possible outcomes supported by the evidence: (1) defendant intentionally shot Powell without justification as the prosecution argued or (2) defendant accidentally shot Powell as he claimed during his testimony. Accordingly, the trial court did not abuse its discretion when it instructed the jury consistently with defendant's accident theory but declined to provide a self-defense instruction. See *People v Trammell*, 70 Mich App 351, 355; 247 NW2d 311 (1976) (holding that the trial court did not err by refusing to give a self-defense instruction when the defendant argued that his actions were an accident).

## IV. CONCLUSION

In summary, we conclude that a felon possessing a firearm is not precluded from asserting self-defense under the SDA when there is evidence that would allow a jury to conclude that the criminal possession of the firearm was justified because the accused had an honest and reasonable belief that the use of deadly force was necessary to prevent imminent death, great bodily harm, or sexual assault to himself or herself or to another. In this case, the trial court did not abuse its discretion when it refused to provide a self-defense instruction because there was no evidence that would

allow a juror to conclude that defendant's possession of a firearm was justified on the basis that he had a reasonable and honest belief that the use of deadly force was necessary to prevent imminent death or great bodily harm to himself or to another and because defendant advanced an accident defense at trial.

Affirmed.

RONAYNE KRAUSE, P.J., and RIORDAN, J., concurred with BORRELLO, J.

PEOPLE v FOMBY

Docket No. 308338. Submitted March 5, 2013, at Lansing. Decided March 19, 2013, at 9:15 a.m.

A Wayne Circuit Court jury, Annette J. Berry, J., convicted William M. Fomby of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and carjacking, MCL 750.529a. At defendant's trial, a certified video forensic technician identified individuals in video surveillance footage of the gas station that was robbed as the same individuals depicted in still photos made from that video. Defendant appealed, arguing that the technician's testimony invaded the province of the jury and that the court's admission of the testimony was error warranting reversal.

The Court of Appeals *held*:

The purpose of the technician's testimony was to establish whether the two suspects involved in the shooting and whose images were captured in the surveillance video had been to the gas station before the murder. The still photos made from the video showed the suspects, the victim, and a woman who accompanied the suspects, and the technician identified those individuals as being in the video. He did not testify that any of the individuals depicted in either the still photographs or the surveillance video was defendant. MRE 702 governs the admission of expert witness testimony, while MRE 701 permits the admission of lay opinion testimony, which to be admissible must be rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. The technician's testimony was lay opinion testimony. It was based on his perception. That he was not present when the events were videotaped was irrelevant because his testimony was based on his own viewing of the video. The testimony was intended to provide a clearer understanding about a fact at issue in the case (whether the suspects depicted in the video had been to the gas station earlier). The technician viewed the six-hour video and the still photos several times to reach his conclusions and opinions, and it could reasonably be inferred that his testimony helped the jury (which did not view the video and photos several times) correctly and efficiently determine that fact. The testimony did not invade

the province of the jury. The technician did not identify defendant in the video or photos or express an opinion on defendant's guilt or innocence. As the creator of the photos, the technician was in the best position to identify the individuals in the photos as those depicted in the video. The trial court did not abuse its discretion by admitting the testimony under MRE 701.

Affirmed.

EVIDENCE — LAY OPINION TESTIMONY — IDENTIFICATION OF INDIVIDUALS IN PHOTOS.

If a witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences that are (1) rationally based on the witness's perception and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; the evidence of a witness who prepared still photos from a video, extensively compared the photos and video, and testified that individuals depicted in the photos were the same as individuals in the video without expressing an opinion on the defendant's innocence or guilt is admissible as lay opinion testimony (MRE 701).

*Bill Schuette*, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training and Appeals, and *Ana I. Quiroz*, Assistant Prosecuting Attorney, for the people.

*Linda D. Ashford, P.C.* (by *Linda D. Ashford*), for defendant.

Before: MURRAY, P.J., and MARKEY and WHITBECK, JJ.

MARKEY, J. Defendant appeals by right his convictions after a jury trial for first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and carjacking, MCL 750.529a. The trial court sentenced defendant to life imprisonment for felony murder and 19 to 80 years' imprisonment for armed robbery and carjacking. We affirm.

Defendant argues that the testimony of Sergeant Ron Gibson, a certified video forensic technician, regarding the identity of individuals in still photos and surveillance footage was lay opinion testimony. Defendant contends that his identity was at issue and this testimony was irrelevant and superfluous because conclusions and opinions regarding the identity of individuals in the still photos and in the surveillance footage could have been drawn by the jury. Therefore, defendant contends, this testimony invaded the province of the jury, and the trial court's admission of this evidence was error warranting reversal. We disagree.

We review for an abuse of discretion the trial court's evidentiary rulings that have been properly preserved. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id*. at 217.

Generally, all relevant evidence is admissible except as otherwise provided by either the state or the federal constitution or by court rule. MRE 402; *People v Yost*, 278 Mich App 341, 355; 749 NW2d 753 (2008). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Even if evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." MRE 403; see also *Yost*, 278 Mich App at 407.

MRE 701 permits the admission of lay opinion testimony and provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based

> on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

MRE 702 permits the admission of expert testimony and provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Gibson's testimony identified individuals depicted in still-frame photos—taken from the surveillance video—as the same individuals in the actual video. The purpose was to determine whether the two suspects involved in the shooting and whose images were captured in the surveillance video had been to the BP gas station before the murder. Gibson explained what he was trying to capture in each of the six still photographs. Each photo captured specific individuals: the suspects, the victim, or a woman whom Gibson saw accompanying the two suspects earlier in the evening of the murder. When asked about the surveillance video, Gibson identified the victim, the suspect who had a shotgun, and the suspect who was holding the victim. Gibson identified Exhibit 4 as a still photo depicting the person in the video who was holding the shotgun and Exhibit 9, another still photo from the video, as depicting the person grasping the victim. Gibson never testified that any of the individuals depicted in either the still photographs or the surveillance video was defendant.

The gateway question is whether Gibson's testimony constituted expert testimony or lay opinion testimony, i.e., whether MRE 702 or MRE 701 applies, respectively. MRE 701 is virtually identical to FRE 701, and because no published Michigan case addresses this specific issue, we review relevant federal cases.[1] In *United States v Begay*, 42 F3d 486, 502 (CA 9, 1994), an officer provided narrative testimony regarding an enhanced video of a demonstration involving about 200 demonstrators that resulted in violence. The officer magnified the videotape, reviewed more than 800 photographs taken during the incident, copied portions of the videotape in slow motion, and enhanced its quality to help his identification of the individuals depicted. He then added circles and arrows to help the jury follow the defendants' movements. *Id*. The United States Court of Appeals for the Ninth Circuit determined that this was not expert testimony; it was lay witness opinion testimony. *Id*. Just as the officer in *Begay* presented lay opinion testimony, Gibson also presented lay opinion testimony. Further, Gibson was qualified as a forensic video technician, "proficient in the acquisition, production and presentation of . . . video evidence in court[.]" Even if these qualifications do not extend to comparison and identification of individuals within still photographs made from videos, Gibson's testimony was properly admitted as lay opinion testimony under MRE 701.

First, Gibson's testimony was rationally based on his perception. Gibson was not at the scene while the video footage was being recorded and did not observe firsthand the events depicted on the video. Instead, Gibson watched the video, produced short clips of the individu-

[1] Lower federal court decisions are not binding on this Court, but may be considered on the basis of their persuasive analysis. *People v Patton*, 285 Mich App 229, 234; 775 NW2d 610 (2009).

als while they were inside the store, and isolated certain frames to create still images. On the basis of his scrutiny of the video surveillance footage and the still images he created from the video, Gibson provided his opinions regarding the identity of individuals within the video as compared to the still images from portions of the video. In *Begay*, the Ninth Circuit held that the contention that the officer's testimony about the videotape was not based on his own perceptions because he was not present when the events that were videotaped occurred lacked merit because his testimony was based on his own perceptions of the video itself. *Begay*, 42 F3d at 502-503. The Ninth Circuit particularly noted the officer's "extensive review" of the video. *Id*. at 503. Similarly here, while Gibson was not at the scene when the events depicted in the video were occurring, Gibson testified that he created the still photos from the surveillance video and cropped some of the photos to create a closer view. The purpose for creating the still photos was to determine whether the two suspects had come to the BP gas station earlier in the evening before the murder took place. As was the conclusion with the officer in *Begay*, it can be inferred from Gibson's testimony that he viewed the video and the still photos several times in order to draw his conclusions and opinions about the identity of the individuals in the surveillance video and still photos as compared to other individuals depicted in the same evidence.

Second, Gibson's testimony was intended to provide a clearer understanding about whether the two suspects depicted in the video had been to the BP gas station earlier in the evening, a fact at issue in the case. In *Begay*, the Ninth Circuit concluded that the officer's testimony likely helped the jury evaluate the videotape because it could reasonably be assumed that "one viewing a videotape of a demonstration involving over

200 people would likely not see certain details, given the tremendous array of events all occurring simultaneously," and the officer's testimony "could help the jury discern correctly and efficiently the events depicted in the videotape." *Begay*, 42 F3d at 503. Similarly here, there were approximately six hours of surveillance video that Gibson reviewed to create still photographs and short clips. It is not clear whether there were other individuals in the six hours of video, but given its length, it can be inferred that there were. Because it can be inferred that Gibson viewed the surveillance footage and still photos several times to reach his conclusions and opinions, it can similarly be reasonably inferred that Gibson's testimony helped the jury to correctly and efficiently determine whether the two individuals seen earlier in the footage were the same individuals who were involved in the murder later depicted in the video.

Third, Gibson's testimony did not invade the province of the jury. In *United States v LaPierre*, 998 F2d 1460, 1465 (CA 9, 1993), an officer provided lay opinion testimony that the defendant was the individual captured in surveillance photographs from the bank that was robbed. The Ninth Circuit concluded that the trial court abused its discretion by admitting this testimony and remanded the case. *Id*. The Ninth Circuit identified two situations under that circuit's precedent illustrative of when such testimony was admissible. The *LaPierre* court opined that the "common thread" of this authority was "reason to believe that the witness is more likely to identify correctly the person than is the jury." *Id*. The court concluded that the issue of whether the defendant in the courtroom was the person pictured in a surveillance photo "was a determination properly left to the jury." *Id.*; see also *United States v Rodríguez-Adorno*, 695 F3d 32, 40 (CA 1, 2012) (holding that when a witness is in no better position than the jury to make

an identification from a video or photograph, the testimony is inadmissible under FRE 701).

But unlike the officer in *LaPierre*, Gibson did not identify defendant in the video or still images. Gibson's testimony only linked individuals depicted in the surveillance video as being the same individuals depicted in the still photographs. While "a witness cannot express an opinion on the defendant's guilt or innocence of the charged offense," *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985), Gibson expressed no such opinion. Further, because Gibson was comparing the video surveillance video to still images that he himself had *created* from the six-hour long video, Gibson was in the best position to identify the individuals in the photographs as being the same as those depicted in the video. Gibson's testimony did not invade the province of the jury.

Because Gibson's testimony was (1) rationally based his own perception of the video and (2) helpful for the jury to determine whether the two individuals seen committing the crime in the surveillance video had come to the BP gas station earlier in the evening, Gibson's testimony was admissible under MRE 701. Further, because we conclude that Gibson's testimony regarding his opinions and conclusions did not invade the province of the jury, we also conclude the trial court did not abuse its discretion by admitting Gibson's testimony.

We affirm.

MURRAY, P.J., and WHITBECK, J., concurred with MARKEY, J.

HAYS v LUTHERAN SOCIAL SERVICES OF MICHIGAN

Docket No. 307414. Submitted January 10, 2013, at Lansing. Decided January 22, 2013. Approved for publication March 19, 2013, at 9:20 a.m. Leave to appeal denied, 494 Mich 869.

Barbara J. Hays brought an action in the Midland Circuit Court against Lutheran Social Services of Michigan after it terminated her employment. Plaintiff was a home-healthcare worker employed by defendant. One of her clients smoked marijuana in his home and in plaintiff's presence. She discussed this with her supervisor and coworkers and eventually spoke to an official of a local narcotics enforcement team, inquiring about the potential consequences for someone who knew about another person's drug use and failed to report it. When asked by the official, she declined to take further action. Plaintiff had signed a confidentiality agreement related to information about clients. Defendant subsequently told plaintiff about a complaint lodged against her for making a phone call about the client. Plaintiff alleged in her action that defendant had terminated her employment in violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., asserting theories that she had been terminated for making a report protected by the WPA and for being about to make a report. The court, Michael J. Beale, J., granted defendant summary disposition on the second claim and denied it with respect to the first. After a jury trial, the court entered a judgment in plaintiff's favor and awarded her attorney fees and costs, but only as case evaluation sanctions. Defendant appealed the denial of summary disposition, and plaintiff cross-appealed the dismissal of her about-to-report WPA claim and the partial denial of her motion for attorney fees.

The Court of Appeals *held*:

1. The WPA provides a remedy for an employee who suffers retaliation for reporting or planning to report a suspected violation of a law, a regulation, or a rule to a public body. The purpose of the WPA is to protect the public by facilitating employee reporting of illegal activity. To establish a prima facie case under the WPA, the plaintiff must show that (1) he or she was engaged in a protected activity as defined by the WPA, (2) he or she was discharged, and (3) a causal connection existed between the protected activity and

the discharge. With regard to the first element of a prima facie case, a plaintiff engages in a protected activity when he or she (1) reports to a public body a violation of a law, a regulation, or a rule, (2) is about to report such a violation to a public body, or (3) is being asked by a public body to participate in an investigation.

2. Defendant argued that plaintiff failed to actually make a report. While the WPA does not define "report," the term means a detailed account of an event or situation, usually based on observation or inquiry. Plaintiff called the officer to inquire about her potential liability if her client's behavior was discovered, not to report any illegal behavior. She did not provide any particulars or otherwise convey information that could have assisted the officer in actually investigating any wrongdoing, and she declined to take further action. There was no evidence that plaintiff identified herself, the client, or the client's location, and she did not provide any sort of detailed account of the situation. Thus, rather than providing a detailed account of an event or situation, plaintiff was merely seeking to obtain information and advice. Categorizing plaintiff's inquiry as a report would not further the purpose of the WPA. Because plaintiff failed to establish that she made a report under the WPA, defendant was entitled to summary disposition on that ground.

3. Plaintiff argued that the trial court improperly granted defendant summary disposition on the WPA claim that was based on her being about to report a suspected violation. Under the WPA, an employee who is about to report a violation receives the same level of protection as one who has reported to a public body. Under MCL 15.363(4), however, an employee seeking protection on the basis of being about to report a violation must prove his or her intent by clear and convincing evidence. The employer is also entitled to objective notice of the whistleblower's report or threat to report. Simply because plaintiff called the official to inquire about her potential liability did not demonstrate that she intended to take any further action and actually report the client's behavior to a public body. In fact, she declined the offer to do so. Plaintiff's discussions with coworkers and supervisors about the client's behavior also failed to demonstrate that she intended to report the behavior. Her conversations demonstrated only that while she knew of the behavior and had a sufficiently long time to report it, she declined to do so. There was also no evidence that plaintiff informed anyone that she was about to take further action and report the behavior to a public body. Consequently, there was no clear and convincing evidence that defendant received objective notice or that plaintiff intended to report the behavior to a public

body, and the trial court did not err by granting summary disposition to defendant on this claim.

4. There was no need to consider plaintiff's arguments concerning attorney fees because she was no longer a prevailing party and was not entitled to fees.

Judgment for plaintiff and attorney-fee award reversed; case remanded for further proceedings.

MASTER AND SERVANT — WHISTLEBLOWERS' PROTECTION ACT — REPORTS TO PUBLIC BODY — PRIMA FACIE CASE.

To establish a prima facie case under the Whistleblowers' Protection Act, the plaintiff must show that (1) he or she was engaged in a protected activity as defined by the act, (2) he or she was discharged, and (3) a causal connection existed between the protected activity and the discharge; with regard to the first element of a prima facie case, a plaintiff engages in a protected activity when he or she (1) reports to a public body a violation of a law, a regulation, or a rule, (2) is about to report such a violation to a public body, or (3) is being asked by a public body to participate in an investigation; the term "report" means a detailed account of an event or situation, usually based on observation or inquiry; an employee who is about to report a violation receives the same level of protection as one who has reported to a public body, but an employee seeking protection on the basis of being about to report a violation must prove his or her intent by clear and convincing evidence and the employer is entitled to objective notice of the whistleblower's report or threat to report; a simple inquiry about the plaintiff's potential liability if he or she does not report the violation does not by itself demonstrate an intent to take any further action and actually report the violation (MCL 15.361 *et seq*.).

*Gafkay & Gardner, PLC* (by *Julie A. Gafkay* and *Katherine S. Gardner*), for plaintiff.

Clark Hill PLC (by *Mark W.McInerney* and *Kymberly N. Kinchen*) for defendant.

Before: OWENS, P.J., and FITZGERALD and RIORDAN, JJ.

PER CURIAM. In this action brought under the Michigan Whistleblowers' Protection Act (WPA), MCL 15.361

*et seq*., defendant, Lutheran Social Services of Michigan, appeals as of right a judgment entered in plaintiff's favor. Plaintiff cross-appeals regarding the trial court's dismissal of her "about to report" claim under the WPA and the partial denial of her motion for attorney fees. We reverse and remand for proceedings consistent with this opinion.

## I. FACTUAL BACKGROUND

Plaintiff was employed as a home-healthcare provider for defendant. During the course of her employment, she encountered Client A, who smoked marijuana in his home and in plaintiff's presence when she was there on assignment by her employer. Plaintiff was informed of Client A's drug use before entering his home, and she discussed it with her supervisor and other coworkers. During one discussion with a coworker about Client A's drug use, plaintiff decided to call 911 and asked to be connected to the Bay Area Narcotics Enforcement Team (BAYANET). When speaking with a BAYANET official, plaintiff inquired about the potential consequences of someone knowing about the drug use of another and not reporting it. At the conclusion of the conversation, when asked by the BAYANET official if she would like to take any further action, plaintiff declined to do so.

As a condition of her employment, plaintiff had signed a client confidentially agreement, consenting to keep information about her clients confidential. Plaintiff was eventually called into a meeting with her supervisor, at which the supervisor informed her that a complaint had been lodged against plaintiff for making a phone call about Client A. Plaintiff admitted to her supervisor that she called BAYANET. Plaintiff also recalled that her supervisor mentioned another phone

call she supposedly made to an insurance company about Client A, although plaintiff denied making that call.

After she was terminated, plaintiff initiated this litigation, claiming that she was terminated in violation of the WPA. While defendant moved for summary disposition on plaintiff's "report" and "about to report" claims, the trial court only granted the motion with respect to the latter claim. After a jury trial, a judgment was awarded in plaintiff's favor in the amount of $77,897.50. The trial court also awarded attorney fees and costs to plaintiff consistently with case evaluation sanctions in the amount of $69,385.55. Defendant now appeals, and plaintiff cross-appeals.

## II. SUMMARY DISPOSITION

### A. STANDARD OF REVIEW

A grant or denial of a motion for summary disposition is reviewed de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). Statutory interpretation also presents a question of law that we review de novo. *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010).

### B. "REPORT" UNDER THE WPA

"The WPA provides a remedy for an employee who suffers retaliation for reporting or planning to report a suspected violation of a law, regulation, or rule to a public body." *Anzaldua v Neogen Corp*, 292 Mich App 626, 630; 808 NW2d 804 (2011). The purpose of the WPA is to protect the public by facilitating employee reporting of illegal activity. *Id*. at 631. It is the plaintiff's burden to establish a prima facie case under the WPA, which requires a showing that "(1) the plaintiff was

engaged in a protected activity as defined by the WPA, (2) the plaintiff was discharged, and (3) a causal connection existed between the protected activity and the discharge." *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004). "The determination whether evidence establishes a prima facie case under the WPA is a question of law that this Court reviews de novo." *Roulston v Tendercare (Mich), Inc*, 239 Mich App 270, 278; 608 NW2d 525 (2000).

In regard to the first element of a prima facie case, a plaintiff engages in a protected activity when he or she (1) reports to a public body a violation of the law, a regulation, or a rule, (2) is about to report such a violation to a public body, or (3) is being asked by a public body to participate in an investigation. *Manzo*, 261 Mich App at 712-713; see also *Ernsting v Ave Maria College*, 274 Mich App 506, 510-511; 736 NW2d 574 (2007). On appeal, defendant argues that the trial court erred by denying its motion for summary disposition because plaintiff failed to actually make a report. As a matter of statutory interpretation, the definition of "report" is a question of law we review de novo. See *Hoffman*, 290 Mich App at 39. While the WPA does not define the term "report," courts may consult dictionary definitions when giving undefined statutory terms their plain and ordinary meaning. *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Accordingly, *Random House Webster's College Dictionary* (2005) defines "report" as "a detailed account of an event, situation, etc., [usually] based on observation or inquiry."[1]

[1] Similarly, in *People v Holley*, 480 Mich 222, 228; 747 NW2d 856 (2008), our Supreme Court relied on *Random House Webster's College Dictionary* (2001) in defining "report" identically in the context of reporting a crime.

According to plaintiff's deposition testimony, she asked the BAYANET officer the following question: "If you're in a situation where there's illegal drugs and you happen -- and this person happens to get in trouble, what is your consequence?" Essentially, plaintiff called the BAYANET officer to inquire about her potential liability if Client A's behavior was discovered, not to report any illegal behavior. Plaintiff did not provide any particulars or otherwise convey information that could have assisted the BAYANET officer in actually investigating any wrongdoing. There is no evidence that plaintiff identified herself, Client A, or Client A's location, nor did she provide any sort of detailed account of the situation. She did not even appear to specify the type of "illegal drugs" at issue. Thus, rather than providing a "detailed account of an event, situation, etc.," plaintiff was merely seeking to obtain information and advice.[2] Her lack of behavior that would constitute reporting is underscored by her negative response when

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[2] Analogous is *Garrie v James L Gray, Inc*, 912 F2d 808 (CA 5, 1990), a case from the United States Court of Appeals for the Fifth Circuit. *Garrie* involved a plaintiff who was employed as a skipper on a ship owned by the defendant. *Id*. at 809. The plaintiff called the Coast Guard and identified himself, but not his employer, and inquired about whether "the regulation regarding maximum working hours was still in effect," although he declined to file a formal complaint. *Id*. (quotation marks omitted). In rejecting the plaintiff's argument that his behavior constituted a report, the court concluded that the plaintiff had

> merely made an inquiry of the Coast Guard as to whether a particular statute was still in effect. He sought information, but did not provide it. He did not file a complaint, nor did he reveal the name of his employer or the vessel upon which he was employed—information without which the Coast Guard could not investigate or prosecute a violation.

*Id*. at 812. Likewise in the instant case, plaintiff sought information without providing anything to BAYANET that it could investigate or use to prosecute any potential violation.

the BAYANET officer asked if she wanted to take any further action.

Plaintiff analogizes the instant case to *Whitaker v US Sec Assoc, Inc*, 774 F Supp 2d 860 (ED Mich, 2011). In *Whitaker*, the plaintiff was a security officer at the Detroit Metropolitan Wayne County Airport, and he brought an action under the WPA against the defendant, claiming that the defendant had retaliated against him for internal complaints and an e-mail he sent to the Transportation Security Administration (TSA). *Id*. at 861-865. The e-mail identified gate-related security issues at the airport and indicated that the plaintiff had "some questions on the regulations." *Id*. at 863.

The federal district court held that the plaintiff had established a prima facie case under the WPA because the e-mail was a "report." *Id*. at 868, 871. The court explained that the e-mail specifically identified two problems and communicated the plaintiff's intent to learn more about the regulations applicable to the two security concerns. *Id*. at 868-869. The court noted that the TSA and the defendant's own management construed this email as "raising concrete security concerns that warranted further investigation . . . ." *Id*. at 868. Ultimately, the court rejected the defendant's contention that the plaintiff's e-mail "merely posed questions and sought information . . . ." *Id*. at 869.

*Whitaker* is not similar to the instant case. The plaintiff in *Whitaker* specifically identified the regulatory violations and provided the TSA with sufficient information to further investigate the regulatory violations. Here, in contrast, plaintiff only referred to "illegal drugs" and did not provide the BAYANET officer with any information to further investigate the illegal activity. Thus, plaintiff's reliance on *Whitaker* is misplaced.

Moreover, categorizing plaintiff's behavior as a report under the WPA would not further the purpose of the statute, namely, to protect the public by encouraging reporting of illegal activity. Plaintiff's phone call did not provide law enforcement with the means to investigate Client A's marijuana use or to protect the public from that behavior. Plaintiff's only concern was to obtain information about her hypothetical liability, not to provide law enforcement officials with any concrete facts from which they could actually investigate or enforce the law. Thus, plaintiff failed to establish that she made a report under the WPA and because she failed to establish a prima facie case, defendant was entitled to summary disposition.[3]

C. "ABOUT TO REPORT" UNDER THE WPA

On cross-appeal, plaintiff argues that the trial court improperly dismissed her "about to report" claim and granted summary disposition to defendant. As noted, the WPA extends to employees who are about to report a suspected violation. *Manzo*, 261 Mich App at 712-713. Thus, "[a] plain meaning reading of the act shows that an employee 'about to' report receives the same level of protection as one who has reported to a public body." *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 611; 566 NW2d 571 (1997). An "employee seeking protection under the 'about to report' language of the

[3] While plaintiff cites her trial testimony to support her argument that she did make a report, when reviewing a trial court's decision on a motion for summary disposition this Court considers only "what was properly presented to the trial court before its decision on the motion." *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 583; 794 NW2d 76 (2010) (quotation marks and citation omitted). Furthermore, despite plaintiff's opinion at trial that she did make a report, the lack of any specific detail provided to the BAYANET officer about Client A clearly demonstrates that plaintiff was merely making an inquiry, not a report.

act [must] prove his intent by clear and convincing evidence." *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 400; 572 NW2d 210 (1998); see also MCL 15.363(4). The employer also is entitled "to objective notice of a report or a threat to report by the whistleblower." *Roulston*, 239 Mich App at 279 (quotation marks and citations omitted).

In the instant case, plaintiff discussed Client A's marijuana use with her supervisor and coworkers and called BAYANET to inquire about any potential liability. Plaintiff argues that these facts establish a prima facie case that she was about to report a violation. In particular, plaintiff relies on her phone call to BAYANET to support her argument that she was about to report Client A's behavior. However, as discussed earlier, that phone call was not a report. Moreover, simply because plaintiff called BAYANET to inquire about her potential liability does not demonstrate that she intended to take any further action and actually report the behavior to a public body. In fact, when the BAYANET officer asked if she would like to take any further action, plaintiff declined the offer. Plaintiff's discussions with coworkers and supervisors about Client A's behavior also fail to demonstrate that she intended to report the behavior. Her conversations demonstrate only that while plaintiff knew about the behavior and had a sufficiently long time to report the behavior, she declined to do so.

There also is no evidence that plaintiff informed anyone that she was about to take further action and report the behavior to a public body. In sharp contrast is *Shallal*, 455 Mich at 613-614, 621, in which the plaintiff told the president of the company that she would report him for misusing funds and abusing alcohol if he did not "straighten up." The plaintiff in *Shallal* also discussed with various individuals the possibility of reporting the

president's behavior. *Id*. at 613-614, 620 n 9. Our Supreme Court held that the plaintiff's explicit threat to report the president combined with her other actions satisfied the "about to report" language of the statute. *Id*. at 615, 621. Yet in the instant case, there is no evidence that plaintiff communicated such an explicit threat to report the behavior. There also is no evidence that plaintiff informed others that she intended to actually report the behavior to a public body.

Consequently, there is no evidence that defendant received objective notice that plaintiff was about to report Client A's behavior to a public body. Plaintiff never informed or threatened defendant that she would place a second call to BAYANET or another law enforcement agency. There is nothing in the record to suggest that plaintiff explicitly or implicitly informed defendant that a report of Client A's illegal activity was pending. Therefore, the trial court did not err by granting summary disposition to defendant on plaintiff's "about to report" claim because there is no clear and convincing evidence of her intent to report the behavior.

## III. CONCLUSION

Because plaintiff failed to establish a prima facie case for her "report" and "about to report" claims under the WPA, defendant was entitled to summary disposition. We decline to address plaintiff's arguments concerning attorney fees because she is no longer a prevailing party and is not entitled to fees. We reverse the trial court's judgment in favor of plaintiff and the award of fees and costs to plaintiff. We remand this case for proceedings consistent with this opinion and do not retain jurisdiction.

OWENS, P.J., and FITZGERALD and RIORDAN, JJ., concurred.

JONES v BITNER

Docket No. 310056. Submitted February 8, 2013, at Lansing. Decided March 21, 2013, at 9:00 a.m.

Ricky L. Jones, personal representative of the estate of Ava A. Jones, deceased, brought an action in the Chippewa Circuit Court against Elaine Bitner, an employee of the Michigan State Police, alleging, in part, that defendant violated the provisions of the Child Protection Law that impose a duty on certain listed professionals to report suspected child abuse or neglect and that, as a direct and proximate result of the breach, decedent died. Plaintiff also alleged gross negligence by defendant. Defendant moved for summary disposition, arguing that she did not have reasonable cause to suspect child abuse or neglect, so there was no duty to report. Plaintiff further argued that, even if she had a duty to report, governmental immunity was a defense to the claim because she had not been grossly negligent and her failure to report was not "the" proximate cause of decedent's death. The court, Nicholas J. Lambros, J., denied the motion on the basis that a jury could find from the facts alleged that defendant had reasonable cause to believe that the child was neglected, thus triggering defendant's duty to report. The court also determined that the governmental immunity statute, MCL 691.1407, did not provide a defense to plaintiff's claim because defendant had a statutory duty to report possible neglect. The court concluded that plaintiff's claim was subject to the "damages proximately caused by" standard of MCL 722.633(1), not the stricter "the proximate cause" standard of MCL 691.1407(2)(c). Defendant appealed.

The Court of Appeals *held*:

1. The mandatory reporting provision of the Child Protection Law, MCL 722.623, does not abrogate the governmental immunity statute, MCL 691.1407. While the mandatory reporting provision imposes liability when an individual named in the statute fails to report suspected abuse or neglect, that liability is limited by governmental immunity.

2. Under the current governmental immunity law applicable to individual lower-ranking governmental employees, courts

should follow a three-part test when, as in this case, the plaintiff has pleaded a negligent tort. When a plaintiff pleads a negligent tort, the court should proceed under MCL 691.1407(2) and determine if the individual caused an injury or damage while acting in the course of employment or service or on behalf of his or her governmental employer and whether (a) the individual was acting or reasonably believed that he or she was acting within the scope of his or her authority, (b) the governmental agency was engaged in the exercise or discharge of a governmental function, and (c) the individual's conduct amounted to gross negligence that was the proximate cause of the injury or damage. The phrase "the proximate cause" means the one most immediate, efficient, and direct cause of the plaintiff's injuries.

3. The Legislature may create exceptions to the general statutory rule of governmental immunity for individual governmental employees either within the governmental tort liability act or in another act.

4. The mandatory reporting statute does not provide an exception to the general statutory rule of governmental immunity for individual governmental employees. The more recently enacted governmental immunity statute, being more recent and more specific than the mandatory reporting statute, has precedence.

5. The reporting statute must be read in conjunction with, and is therefore limited by, the governmental immunity statute. Therefore, in order for defendant to be liable under the mandatory reporting statute, her conduct must have been both grossly negligent and the proximate cause of decedent's death.

6. It appears from the limited record that only the acts or omissions of decedent's mother were the proximate cause of decedent's death. Defendant's alleged failure to report could not have been the proximate cause of decedent's death. Plaintiff's claim is barred by immunity granted by law. However, because plaintiff seeks the opportunity to amend the complaint to plead specific allegations of gross negligence and proximate cause and discovery has not occurred and because the trial court did not have the opportunity to rule on these issues, the matter was remanded to provide plaintiff the opportunity to seek leave to amend the complaint in the trial court.

Reversed and remanded.

1. TORTS — NEGLIGENCE — GOVERNMENTAL IMMUNITY.

Courts should follow a three-part test when a plaintiff has pleaded that a lower-ranking governmental employee has committed a negligent tort and the defendant claims governmental immu-

nity; courts should determine if the individual caused an injury or damage while acting in the course of employment or service on behalf of a governmental employer and whether (1) the individual was acting or reasonably believed that he or she was acting within the scope of his or her authority, (2) the governmental agency was engaged in the exercise or discharge of a governmental function, and (3) the individual's conduct amounted to gross negligence that was the proximate cause of the injury or damage; "the proximate cause" means the one most immediate, efficient, and direct cause of the plaintiff's injuries (MCL 691.1407[2]).

2. TORTS — GOVERNMENTAL IMMUNITY — EXCEPTIONS TO GOVERNMENTAL IMMUNITY.

Although the governmental immunity act proclaims that it contains all the exceptions to governmental immunity, the Legislature may create additional exceptions either within the act or in another act (MCL 691.1401 *et seq*.).

3. CONFLICT OF LAWS — CHILD PROTECTION LAW — GOVERNMENTAL TORT LIABILITY ACT.

The mandatory reporting provision of the Child Protection Law does not abrogate the governmental immunity act; while the mandatory reporting provision imposes liability when an individual named in the statute fails to report suspected abuse or neglect, that liability is limited by governmental immunity (MCL 691.1407; MCL 722.623).

*J. Nicholas Bostic*, for plaintiff.

*Bill Schuette*, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Mark E. Donnelly*, Assistant Attorney General, for defendant.

Before: K. F. KELLY, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM. Defendant appeals as of right an order denying her motion for summary disposition pursuant to MCR 2.116(C)(7) (governmental immunity) and (8)

(failure to state claim).[1] We conclude that the mandatory reporting provision of the Child Protection Law (CPL), MCL 722.623, does not abrogate the governmental immunity statute, MCL 691.1407. While the mandatory reporting provision imposes liability when an individual named in the statute fails to report suspected abuse or neglect, that liability is limited by governmental immunity. Therefore, we reverse the order of the trial court and remand for further proceedings in order to afford plaintiff an opportunity to seek leave to amend the complaint.

## I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff is the personal representative of the estate of Ava Annmarie Jones, deceased. Defendant was employed by the Michigan State Police. The complaint against defendant alleged, in relevant part:

> 5. Ava Annmarie Jones died as a result of the following facts:
>
> a. Kelly Ann Jones is the mother to Ava Annmarie Jones.
>
> b. On or about December 7, 2008, Kelly Ann Jones had morphine pills in her possession and in the residence she shared with the decedent.
>
> c. On or about December 7, 2008, Kelly Ann Jones negligently allowed the decedent to have access to or deliberately provided morphine pills to the decedent.
>
> d. On or about December 7, 2008, the decedent was 2 years 8 months old.
>
> e. On the morning of December 8, 2008, the decedent was found by Kelly Ann Jones to be unresponsive and not breathing.

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[1] The initial order indicated that defendant's motion was denied pursuant to MCR 2.116(C)(8), but the parties later stipulated amending the order to clarify that defendant's motion was denied pursuant to MCR 2.116(C)(7) as well.

f. Emergency medical care was rendered to the decedent on December 8, 2008 but she was pronounced dead by the local medical examiner.

g. An autopsy revealed levels of morphine in the decedent which were lethal and described as the mechanism of her death.

6. Defendant owed the decedent a duty to use due care.

7. Defendant violated that duty in the following manner:

a. In October, 2008, members of the Straights [sic] Area Narcotics Enforcement Team (SANE) used an informant, Devon Ollie Johnson-Backus (Backus), to purchase morphine from Kelly Ann Jones.

b. During October and November of 2008, Defendant and other members of SANE were aware that during purchases of morphine by Backus from Kelly Jones that the decedent was present during the exchange.

c. Defendant and other members of SANE directed and caused the purchase of the morphine pills from Kelly Jones by Backus.

Plaintiff alleged that defendant violated the "mandatory reporting provisions" of MCL 722.623, which require a law-enforcement officer to report suspected child abuse or neglect. Plaintiff specifically alleged:

8. As a direct and proximate result of the breach by Defendant, the decedent died.

9. The conduct of Defendant Bitner and other members of SANE were grossly negligent and demonstrated a substantial lack of concern for whether the decedent was injured or died because:

a. Defendant Bitner and other members of SANE were motivated by their desire to obtain another successful prosecution of decedent's mother;

b. Defendant Bitner and other members of SANE were motivated by a desire to protect the identity of their confidential information [sic];

c. Defendant Bitner and other members of SANE were aware that morphine was a dangerous, scheduled controlled substance;

d. Defendant Bitner and other members of SANE were aware of the age and helplessness of the decedent;

e. Defendant Bitner and other members of SANE were aware of the mother-daughter relationship between Kelly Jones and the decedent and the decedent's dependency on Kelly Jones;

f. Defendant Bitner and other members of SANE were aware of the specific strength and quality of the pills possessed and sold by Kelly Jones;

g. Upon information and belief, Defendant Bitner and other members of SANE knew or should have known of their obligation to report based upon their previous and subsequent reports of drug dealers to Children's Protective Services and policy;

h. Defendant Bitner and other members of SANE knew or should have known that the pills were potentially lethal if ingested by decedent.

Defendant moved for summary disposition.[2] Defendant argued that she did not have "reasonable cause to suspect child abuse or neglect," so there was no corresponding duty to report. Defendant further argued that, even if she had a duty to report, governmental immunity was a defense to plaintiff's claim because she was not grossly negligent and her failure to report was not *the* proximate cause of decedent's death.

In response, plaintiff argued that his complaint alleged both common-law gross negligence and negligence per se. Plaintiff argued that knowingly allowing a young child to remain in such a home environment showed

[2] Although the motion requested summary disposition pursuant to MCR 2.116(C)(8), the argument was really for summary disposition based on immunity, which should have been brought pursuant to MCR 2.116(C)(7).

reckless and callous behavior. Plaintiff also argued that defendant was negligent per se and violated her duty to report.

The trial court denied defendant's motion for summary disposition. On the basis of plaintiff's complaint, it was assumed that defendant knew that decedent's mother illegally distributed drugs from her house in decedent's presence and that, from these alleged facts, a jury could find that defendant had "reasonable cause" to believe that the child was neglected, thus triggering defendant's duty to report. The trial court further concluded that the governmental immunity statute, MCL 691.1407, did not provide a defense to plaintiff's claim because defendant had a statutory duty to report the possible neglect. Thus, plaintiff's claim was subject to the "damages proximately caused by" standard of MCL 722.633(1), not the stricter "*the* proximate cause" standard of MCL 691.1407(2)(c). (Emphasis added.) The trial court indicated that only after defendant reported the possible neglect would plaintiff's claim be subject to governmental immunity.

The trial court's April 18, 2012, order indicated that defendant's motion for summary disposition was denied pursuant to MCR 2.116(C)(8). However, on May 23, 2012, the trial court entered a stipulated order amending its original order to provide that summary disposition was denied pursuant to MCR 2.116(C)(7) as well. Defendant now appeals as of right.

## II. STANDARD OF REVIEW

We review de novo a trial court's decision regarding a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Summary disposition is appropriate when a claim is barred because of "immunity granted by law . . . ."

MCR 2.116(C)(7). A party may support a motion under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). "In reviewing a (C)(7) motion, a court must accept all well-pleaded allegations as true and construe them in favor of the nonmoving party." *Tellin v Forsyth Twp*, 291 Mich App 692, 698; 806 NW2d 359 (2011).

Similarly, in evaluating a party's motion for summary disposition pursuant to MCR 2.116(C)(8), a court "must accept all well-pleaded factual allegations as true, construing them in a light most favorable to the nonmoving party." *Cummins v Robinson Twp*, 283 Mich App 677, 689; 770 NW2d 421 (2009). Summary disposition on the basis of subrule (C)(8) should be granted "only where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Cummins*, 283 Mich App at 689-690 (quotation marks and citation omitted).

We also review de novo questions of statutory interpretation involving the application of governmental immunity. *Carr v City of Lansing*, 259 Mich App 376, 379; 674 NW2d 168 (2003). "The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature." *Id*.

## III. ANALYSIS

The CPL imposes a duty on certain listed professionals to report suspected child abuse or neglect. *Marcelletti v Bathani*, 198 Mich App 655, 659; 500 NW2d 124 (1993). MCL 722.623(1)(a) reads, in relevant part, as follows:

An individual is required to report under this act as follows:

> (a) A . . . law enforcement officer . . . who has reasonable cause to suspect child abuse or neglect shall make immediately, by telephone or otherwise, an oral report, or cause an oral report to be made, of the suspected child abuse or neglect to the department. Within 72 hours after making the oral report, the reporting person shall file a written report as required in this act.

MCL 722.633(1) further provides:

> A person who is required by this act to report an instance of suspected child abuse or neglect and who fails to do so is civilly liable for the damages proximately caused by the failure.[3]

Plaintiff relies heavily on *Williams v Coleman*, 194 Mich App 606; 488 NW2d 464 (1992), to support his position that the mandatory reporting provision abrogates defendant's ability to claim governmental immunity. In *Williams*, the decedent was a 23-month-old child who died under circumstances suggesting "long-term nutritional deprivation or failure to thrive." *Id*. at 608-609. The defendants were social workers employed by the Wayne County Department of Social Services. *Id*. at 608. The plaintiff, the personal representative of the decedent's estate, sued the defendants in 1982, alleging failure to report child abuse and neglect as required by MCL 722.623. *Williams*, 194 Mich App at 608-609. On appeal, the defendants argued that common-law governmental immunity for individual governmental employees protected them from liability under the CPL. *Id*. at 610-612. In affirming the judgment against the defendants, this Court explained that the purpose of the CPL is to "protect abused and neglected children." *Id*.

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[3] MCL 722.633(2) further provides: "A person who is required by this act to report an instance of suspected child abuse or neglect and who knowingly fails to do so is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both."

at 614. In light of this purpose, the Legislature decided to impose the reporting requirement on a variety of professionals because "it made clear that child safety is a priority and that the needs of the listed professionals are secondary where it comes to reporting." *Id*. at 615. Importantly, the listed professionals included both governmental employees and nongovernmental employees. *Id*. at 613-614. Further, the legislative history and the plain language of the CPL "reveal[ed] the Legislature's intent to apply the statute to the persons listed, regardless of their employment status." *Id*. at 614. Accordingly, this Court held that "through the Child Protection Law the Legislature intended to abrogate established immunity rules of the common law related to persons required to report abuse and neglect." *Id*. at 615-616.

However, *Williams* was decided under *Ross v Consumers Power Co* (*On Rehearing*), 420 Mich 567, 631-632; 363 NW2d 641 (1984). In *Ross*, our Supreme Court held that governmental immunity for individuals was provided by the common law. Certain high-level officials were generally absolutely immune from tort liability, while lower-level officials were immune from tort liability when acting within the scope of employment, acting in good faith, and performing discretionary acts. *Id*. at 633-634. When *Ross* was decided, the then existing version of MCL 691.1407 only protected agencies, not individuals. In 1986, the Legislature amended MCL 691.1407. It currently reads, in relevant part, as follows:

> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a govern-

> mental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Accordingly, under the current governmental immunity law for lower-ranking employees, courts should follow a three-part test when, as here, the plaintiff has pleaded a negligent tort:

> If the plaintiff pleaded a negligent tort, proceed under MCL 691.1407(2) and determine if the individual caused an injury or damage while acting in the course of employment or service or on behalf of his governmental employer and whether:
>
> (a) the individual was acting or reasonably believed that he was acting within the scope of his authority,
>
> (b) the governmental agency was engaged in the exercise or discharge of a governmental function, and
>
> (c) the individual's conduct amounted to gross negligence that was the proximate cause of the injury or damage. [*Odom*, 482 Mich at 479-480.]

With respect to the third element, it is important to distinguish between "*the* proximate cause" and "*a* proximate cause." *Robinson v Detroit*, 462 Mich 439, 468; 613 NW2d 307 (2000). "[T]he proximate cause" means "the one most immediate, efficient, and direct cause" of the plaintiff's injuries. *Id*. at 446.

The CPL sets forth a lower standard for liability for a failure to report than the governmental immunity statute. Under the CPL, a person may be liable for a failure to report when the child's injures were "proximately caused by" the failure to report. MCL 722.633(1). The CPL also does not refer to the strict "grossly negligent" standard. In contrast, under the governmental immunity statute, a defendant's actions must be both grossly negligent and "*the* proximate cause" of the child's injuries. MCL 691.1407(2)(c) (emphasis added). Plaintiff argues that the lower standard set forth in the mandatory reporting statute applies and that there is no reason to look at the narrower standard under the governmental immunity statute. We disagree.

"Although the [governmental tort liability act (GTLA), MCL 691.1401 *et seq*.] proclaims that it contains all the exceptions to governmental immunity, the Legislature remains free to create additional exceptions, either within the GTLA or another statute." *State Farm Fire & Cas Co v Corby Energy Servs, Inc*, 271 Mich App 480, 485; 722 NW2d 906 (2006). In explaining the rule that the Legislature may create exceptions to individual governmental immunity not specifically referred to in the GTLA, this Court reasoned that the Legislature cannot bind future Legislatures. *Id*. MCL 691.1407 was amended in 1986 to provide governmental immunity for individual governmental employees. The CPL was enacted before 1986, and the Legislature has repeatedly made minor amendments to the CPL after 1986. We conclude that the mandatory reporting statute does not provide an exception to the general statutory rule of governmental immunity for individual governmental employees. The Legislature is presumed to be aware of the consequences of its use or omission of statutory language and the effect of new laws on all

existing laws. *In re Messer Trust*, 457 Mich 371, 380; 579 NW2d 73 (1998); *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). In spite of its knowledge regarding the GTLA, the Legislature has not amended the mandatory reporting statute to clearly provide that it abrogates the later-enacted governmental immunity statute. A more recently enacted law has precedence, especially when the statute is both the more specific and the more recent. *Parise v Detroit Entertainment, LLC*, 295 Mich App 25, 28; 811 NW2d 98 (2011).

We find further support for applying the governmental immunity statute to the mandatory reporting statute in *Hannay v Dep't of Transp*, 299 Mich App 261; 829 NW2d 883 (2013). In *Hannay*, we concluded that while a plaintiff could bring a claim under the motor vehicle exception to governmental immunity, "the fact that a tort action arising from a motor vehicle accident may be pursued against a governmental entity does not except the action from the application of the no-fault act [MCL 500.3101 *et seq.*]." *Hannay*, 299 Mich App at 267. Thus, in determining the amount of damages that a plaintiff may recover from a governmental agency under the motor vehicle exception to governmental immunity, the no-fault act must apply. *Id.* The same principle holds true in the case at bar. The mandatory reporting statute must be read in conjunction with, and is therefore limited by, the governmental immunity statute. It follows that, in order for defendant to be liable under the mandatory reporting statute, her conduct must have been grossly negligent and *the* proximate cause of Ava's death.

The record reveals that Ava's mother, Kelly Ann Jones, was convicted of involuntary manslaughter following Ava's death. See *People v Jones*, unpublished

opinion per curiam of the Court of Appeals, issued July 5, 2011 (Docket No. 298948). It was alleged that Kelly Ann Jones either intentionally administered a lethal amount of morphine to Ava or allowed Ava to come into contact with morphine pills and then failed to seek assistance when she realized that Ava had taken some of the pills off a nightstand. From the limited record before us, it appears that only Kelly Ann Jones's acts or omissions were the proximate cause of Ava's death. Thus, it follows that defendant's alleged failure to report could *not* have been the proximate cause of Ava's death and that plaintiff's claim is barred by immunity granted by law. Despite the foregoing, plaintiff's counsel seeks the opportunity to amend the complaint to plead specific allegations of gross negligence and proximate cause. Plaintiff also argues that discovery, which has not yet been undertaken, will support the allegations in an amended complaint. Because the trial court did not have the opportunity to rule on these issues, we conclude that plaintiff ought to have the opportunity to seek leave to amend the complaint in the trial court. The trial court may then make a determination regarding whether such an amendment would be futile.

Reversed and remanded for further proceedings consistent with this opinion.[4] We do not retain jurisdiction.

K. F. KELLY, P.J., and MARKEY and FORT HOOD, JJ., concurred.

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[4] Because we conclude that defendant is entitled to judgment as a matter of law under the governmental immunity statute, we decline to address the remainder of her arguments, including her claim that there was no "reasonable suspicion" to suspect abuse or neglect. Again, we will accept plaintiff's well-pleaded allegations as true.

NATURAL RESOURCES DEFENSE COUNCIL v
DEPARTMENT OF ENVIRONMENTAL QUALITY

Docket No. 310036. Submitted March 6, 2013, at Lansing. Decided March 21, 2013, at 9:05 a.m.

The Natural Resources Defense Council and the Sierra Club petitioned the Ingham Circuit Court to review a decision by the Department of Environmental Quality and its director (the DEQ) to issue the city of Holland a permit to install a new boiler in one of its electricity generating plants. Petitioners alleged that the DEQ had failed to adequately consider alternatives as required by the Clean Air Act, 42 USC 7401 *et seq*., and associated state and federal regulations. The court, Rosemarie E. Aquilina, J., granted Holland's motion to intervene. After a hearing, the court affirmed the DEQ's decision to issue the permit. Petitioners appealed.

The Court of Appeals *held*:

1. The Court of Appeals had subject-matter jurisdiction to consider petitioners' appeal as of right. MCL 324.5505(8) provides that any person may appeal the DEQ's decision to issue or deny a permit to install equipment that may emit an air contaminant in accordance with MCL 600.631, which in turn provides in part that an agency decision from which an appeal or other judicial review has not otherwise been provided for by law may be made in accordance with the court rules. MCR 7.203(A)(1)(a) provides that the Court of Appeals has jurisdiction of an appeal of right filed by an aggrieved party from final judgments or final orders of the circuit court or court of claims, except judgments or orders of the circuit court on appeal from any other court or tribunal. When deciding whether to issue or deny permits to install, the DEQ is not acting in a judicial or quasi-judicial capacity; therefore, it is not a tribunal for purposes of the exception in MCR 7.203(A)(1)(a). Although the staff comment to MCR 7.203(A)(1)(a) states that an appeal from a lower court judgment after review of an agency decision will be by leave only, staff comments are not part of the court rule and are not binding.

2. The circuit court may have erred by reviewing the evidence underlying the DEQ's determination, given that no contested case

hearing was required. However, any error was harmless because the court correctly determined that the DEQ's decision was authorized by law.

3. The circuit court properly affirmed the DEQ's issuance of the permit because the DEQ's analysis of the best technology available to control the emission of regulated pollutants from the proposed boiler was adequate. The fact that the DEQ did not follow the commonly used "top-down" method of conducting this analysis was not determinative of whether its decision to issue the permit was authorized by law because this method is not mandatory; a reasoned analysis that takes into account the considerations enumerated in the Clean Air Act is sufficient. The DEQ provided a reasoned analysis of each type of fuel that the proposed boiler could use without major modifications, including wood and biomass. Accordingly, the DEQ's decision did not violate 42 USC 7479(3) and the permit to install was authorized by law.

Affirmed.

1. APPEALS — JURISDICTION — SUBJECT-MATTER JURISDICTION — APPEALS FROM OTHER COURTS OR TRIBUNALS — AGENCY DECISIONS — CLEAN AIR ACT — PERMITS TO INSTALL EQUIPMENT.

The Court of Appeals has subject-matter jurisdiction over appeals by right of decisions by the Department of Environmental Quality to issue or deny a permit to install equipment that may emit an air contaminant pursuant to MCL 324.5505(8); when deciding whether to issue or deny permits to install, the DEQ is not acting in a judicial or quasi-judicial capacity and is therefore not a tribunal for purposes of the exception in MCR 7.203(A)(1)(a); the staff comment to MCR 7.203(A)(1)(a) stating that an appeal from a lower court judgment after review of an agency decision will be by leave only is not a part of the court rule and is not binding (MCL 600.631).

2. ADMINISTRATIVE LAW — CLEAN AIR ACT — PERMITS TO INSTALL EQUIPMENT — ANALYSIS OF BEST AVAILABLE CONTROL TECHNOLOGY — "TOP-DOWN" METHOD.

A reasoned analysis of the best technology available to control the emission of regulated pollutants from a facility seeking a permit is statutorily sufficient if it takes into account the considerations enumerated in the Clean Air Act; use of the "top-down" method of analyzing the best available control technology is not mandatory (42 USC 7479[3]).

Natural Resources Defense Council (by *Jessie J. Rossman*) and Great Lakes Environmental Law Center

(by *Nick Schroeck*) for the Natural Resources Defense Council and the Sierra Club.

*Bill Schuette*, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Neil D. Gordon*, Assistant Attorney General, for the Department of Environmental Quality and its director.

*Barnes & Thornburg LLP* (by *Charles M. Denton* and *Valerie B. Mullican*) and *Cunningham Dalman, P.C.* (by *Andrew J. Mulder*), for the city of Holland.

Before: MURRAY, P.J., and MARKEY and WHITBECK, JJ.

PER CURIAM. In this appeal concerning the requirements of the federal Clean Air Act,[1] petitioners Natural Resources Defense Council and the Sierra Club (petitioners) appeal as of right the circuit court's order affirming a permit to install issued by respondent Michigan Department of Environmental Quality (the Department), which allows intervening respondent city of Holland's Board of Public Works (individually and collectively, Holland) to install a new electric generating unit in an existing power plant. Petitioners contend that the circuit court applied the wrong standard of review and that the Department's decision was not authorized by law. We disagree, and affirm.

## I. FACTS

### A. BACKGROUND

Holland operates three electric generation plants, one of which is the James DeYoung Generating Station. The DeYoung plant has three active coal-fired electric

[1] 42 USC 7401 *et seq*.

generating units. In 2006, Holland decided to replace an old boiler in one of the units. In January 2007, Holland petitioned the Department for permits to replace the boiler with a new, circulating fluidized bed boiler. Holland's application included an analysis that assessed the impact of the various technologies on particulate matter emissions. It determined that, if it used a fabric filter, its emissions would fall below Environmental Protection Agency guidelines.

B. HOLLAND'S ANALYSIS

During the Department's public comment period, petitioners submitted comments, including an objection that Holland had failed to conduct a "best available control technology" analysis on clean fuels, contrary to federal law. Petitioners requested that Holland analyze "clean fuels" such as wood and biomass.

On August 17, 2009, Holland provided additional information to the Department, including a best available control technology analysis for different types of fuel. The analysis identified six possible fuels that the boiler could burn without significant modification, including biomass (which in turn included wood), petroleum coke or "petcoke," tire-derived fuel, and varieties of coal. The analysis considered seven specific characteristics for each fuel: heating value, ash content, sulfur content, chroline content, mercury content, fluorine content, and lead content.

Concerning particulate matter, the analysis noted that "[s]ome fraction of the volatile organic compounds emitted from the unit will contribute to condensable particulate, which may be higher for the biomass fuels that are more difficult to combust." It indicated that western sub-bituminous coal has a lower sulfur and mercury content than eastern coal, but that the supply

of this coal is limited by long-term contracts. Concerning carbon monoxide, the analysis stated that biomass has a higher moisture content, which is likely to cause increased carbon monoxide formation. The analysis determined that "[w]ith the exception of biomass, increased usage of varying amounts of coal, petcoke, and [tire-derived fuel] is not likely to have an effect on the formation of [carbon monoxide]."

The analysis also compared a variety of technologies, and the effects the technologies would have on various emissions. The analysis ultimately determined that a fabric filter, limestone injection, and the use of fuel to control sulfur oxides would result in the best available control technology.

### C. THE MANDAMUS ACTION

In August 2010, the Department denied Holland's permit application on the grounds that Holland failed to demonstrate that it needed the improvement to meet its projected capacity requirements. In September 2010, Holland sought a writ of mandamus, pursuant to which the circuit court remanded the case to the Department to base its decision on whether the application met the air quality requirements in effect on August 20, 2010. The Department ultimately granted Holland a permit to install.

### D. PETITIONERS' APPEAL IN THE CIRCUIT COURT

In May 2011, petitioners petitioned the circuit court to review the Department's issuance of the permit on several grounds. Pertinent to this appeal, petitioners contended that Holland failed to comply with the requirements of the Clean Air Act and federal and state regulations. Petitioners asserted that these statutes

and regulations required the Department to evaluate clean fuels and consider alternative technologies and that the Department's analysis of these fuels and technologies was inadequate and flawed.

The circuit court granted Holland's motion to intervene. At the hearing on the petition, the circuit court commented on the "enormous administrative record" and opined that it could not substitute its judgment for the Department's as long as the Department's decision was supported by substantial evidence. The circuit court also determined that the agency's decision was authorized by law, and it affirmed the Department's issuance of the permit.

Petitioners now appeal, arguing that (1) the circuit court failed to apply the proper standard of review and (2) the Department's permit was not authorized by law because the "best available control technology" analysis did not comply with the Clean Air Act.

## II. HOLLAND'S JURISDICTIONAL CHALLENGE

### A. STANDARD OF REVIEW

We review de novo whether this Court has subject-matter jurisdiction to hear an appeal, because it is a question of law.[2]

### B. LEGAL STANDARDS

Statutes and court rules determine the jurisdiction of this Court.[3] The Legislature has provided in MCL 324.5505(8) that "[a]ny person may appeal the issuance or

[2] *Lapeer Co Clerk v Lapeer Circuit Judges*, 465 Mich 559, 566; 640 NW2d 567 (2002); *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009).

[3] Const 1963, art 6, § 10; *Chen*, 284 Mich App at 191.

denial by the department of a permit to install . . . in accordance with [MCL 600.631]." MCL 600.631 in turn provides that

> [a]n appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law . . . . Such appeals shall be made in accordance with the rules of the supreme court.

MCR 7.203(A)(1)(a) provides that this Court does *not* have jurisdiction over an appeal of right from an order of the circuit court issued after an appeal to that court from a *tribunal*:

> (A) Appeal of Right. The court has jurisdiction of an appeal of right filed by an aggrieved party from the following:
>
> (1) A final judgment or final order of the circuit court, or court of claims, . . . except a judgment or order of the circuit court
>
> (a) on appeal from any other court *or tribunal* . . . . [Emphasis supplied.]

C. APPLYING THE STANDARDS

Holland argues that this Court does not have subject-matter jurisdiction to hear this appeal because it is from "any other court or tribunal," and thus MCR 7.203(A)(1)(a) prohibits an appeal of right. We disagree.

Holland primarily relies on the language of the staff comment to MCR 7.203(A)(1)(a), which states: "An appeal from a lower court judgment after review of an agency decision *will be by leave only*." (Emphasis added.) However, a staff comment is not part of the court rule and does not bind this Court.[4] Considering only the plain language of MCR 7.203(A)(1)(a), we

[4] See *People v Petit*, 466 Mich 624, 632 n 9; 648 NW2d 193 (2002).

disagree with Holland's contention and the staff comment, insofar as it applies to an appeal of right from a circuit court's order affirming or denying the Department's decision to issue or decline to issue a permit to install under MCL 324.5505(8). We conclude that we have subject-matter jurisdiction to hear, as an appeal of right, such an appeal.

Under MCR 7.203(A)(1)(a), a party does not have an appeal of right in this Court arising out of an order of a *tribunal* that was appealed in the circuit court. Therefore, the question is whether the Department is acting as a "tribunal" when issuing or denying a permit to install.

"Tribunals include administrative agencies acting in a judicial or quasi-judicial capacity[.]"[5] However, not all agencies' actions are taken in a judicial or quasi-judicial capacity.[6] To determine whether an administrative agency's determination is adjudicatory in nature, courts compare the agency's procedures to court procedures to determine whether they are similar.[7] Quasi-judicial proceedings include procedural characteristics common to courts, such as a right to a hearing, a right to be represented by counsel, the right to submit exhibits, and the authority to subpoena witnesses and require parties to produce documents.[8]

The hearings in this case were public hearings, not adversarial hearings. Indeed, the Department does not have the statutory authority to hold a contested case

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[5] *Fort v Detroit*, 146 Mich App 499, 503; 381 NW2d 754 (1985).

[6] See *Vander Toorn v Grand Rapids*, 132 Mich App 590, 597; 348 NW2d 697 (1984).

[7] *Nummer v Dep't of Treasury*, 448 Mich 534, 543; 533 NW2d 250 (1995); *id*. at 558-559 (MALLETT, J., dissenting).

[8] See *id*. at 542-543; *id*. at 558-559 (MALLETT, J., dissenting).

hearing concerning a permit to install.[9] There is no indication that interested persons here had the opportunity or right to call witnesses or submit exhibits. The procedures the Department used to determine whether to issue a permit in this case are not at all similar to the procedures that courts use. We conclude, therefore, that the Department was not acting as a "tribunal" when it issued Holland's permit to install. And we further conclude that MCR 7.203(A)(1)(a) does not apply and that this Court has the jurisdiction to hear this appeal as an appeal of right.

## III. THE STANDARD OF REVIEW OF AN AGENCY DECISION NOT SUBJECT TO A CONTESTED CASE HEARING

### A. OUR STANDARD OF REVIEW

Whether a circuit court applied the appropriate standard of review is a question of law that this Court reviews de novo.[10]

### B. THE CIRCUIT COURT'S STANDARD OF REVIEW

When the agency's governing statute does not require the agency to conduct a contested case hearing, the circuit court may not review the evidentiary support underlying the agency's determination.[11] Judicial review is " 'limited in scope to a determination whether the action of the agency was authorized by law.' "[12] The agency's action was not authorized by law if it violated

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[9] *Wolverine Power Supply Coop, Inc v Dep't of Environmental Quality*, 285 Mich App 548, 572; 777 NW2d 1 (2009).

[10] *Arthur Land Co, LLC v Otsego Co*, 249 Mich App 650, 661-662; 645 NW2d 50 (2002).

[11] *Northwestern Nat'l Cas Co v Comm'r of Ins*, 231 Mich App 483, 488; 586 NW2d 563 (1998).

[12] *Id.*, quoting *Brandon Sch Dist v Mich Ed Special Servs Ass'n*, 191 Mich App 257, 263; 477 NW2d 138 (1991).

a statute or constitution, exceeded the agency's statutory authority or jurisdiction, materially prejudiced a party as the result of unlawful procedures, or was arbitrary and capricious.[13] Courts review de novo questions of law, including whether an agency's action complied with a statute.[14]

C. APPLYING THE STANDARDS

Petitioners contend that the circuit court improperly deferred to the Department, rather than reviewing de novo whether the Department's decision complied with the Clean Air Act. We conclude that, to the extent that the circuit court erred when reviewing the Department's decision, its error was harmless.

The circuit court opined that the Department's "expertise in this particular area of regulation is entitled to due deference." Read in context, the circuit court's statement about any deference that would be due to the Department follows its statement that it could not substitute its judgment for that of the Department unless the Department's decision was not supported by substantial evidence, and precedes its statement that it must "stick to the record that was made." From the context of its statement, it is clear that whatever deference the circuit court expressed was toward the Department's interpretation of the evidence.

The circuit court may have erred in this case because there was no contested case hearing, and therefore the circuit court should not have reviewed the record evidence. But the circuit court's ruling does not indicate that

[13] *Id*.

[14] *Wolverine Power Supply Coop, Inc*, 285 Mich App at 554; see also *In re Complaint of Rovas against SBC Mich*, 482 Mich 90, 100-101; 754 NW2d 259 (2008).

it applied any standard other than the de novo standard when it reviewed whether the Department's decision was authorized by law. The circuit court ruled as follows:

> I think the petitioners have brought up some very interesting points, but I also believe that they've failed to carry their burden to prove that [the Department's] decision was not authorized by the law. I do believe the agency's decision is authorized by law. I believe it was not arbitrary and capricious.

We are not convinced from this ruling that the circuit court applied an incorrect standard when reaching these conclusions.

This Court will not overturn a circuit court's order on the basis of a harmless error.[15] A circuit court's misapplication of the substantial-evidence test in a case in which it only has authority to determine whether the Department's decision was authorized by law is a harmless error if it properly determined that the agency's decision was authorized by law.[16] We conclude that this error, if error actually occurred, was harmless because, for reasons we will discuss, the circuit court was correct when it determined that the Department's decision was authorized by law.

## IV. REQUIREMENTS OF THE FEDERAL CLEAN AIR ACT

### A. STANDARD OF REVIEW

As previously discussed, courts review de novo questions of law, including whether an agency's action complies with a statute.[17]

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[15] MCR 2.613(A).

[16] See *Northwestern Nat'l Cas Co*, 231 Mich App at 490-491.

[17] *Wolverine Power Supply Coop, Inc*, 285 Mich App at 554; see *In re Rovas Complaint*, 482 Mich at 100.

We note that resolution of this issue requires us to interpret and apply a federal statute. This Court may review an issue of federal law regarding a federal statute, and interpret federal statutory provisions and regulations.[18] Unless there is a conflict among federal courts, this Court is bound by the holdings of federal courts on federal questions.[19]

B. STATUTORY BACKGROUND

Under the Clean Air Act's program designed to prevent the significant deterioration of air quality, a major facility that emits air pollution must obtain a permit before it can install a modification.[20] The Michigan Legislature has granted the Department authority to promulgate rules to control air pollution and comply with the Clean Air Act.[21] Michigan's regulatory scheme, which operates somewhat differently, requires certain facilities to obtain a permit before installing a major modification.[22]

Before issuing a permit, the agency must hold a public hearing at which the public may comment on the proposed facility's "air quality impact of the major source, alternatives to it, the control technology required, and other appropriate considerations."[23] The Department must consider these comments when making its decision.[24]

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[18] *Woodman v Miesel Sysco Food Co*, 254 Mich App 159, 165; 657 NW2d 122 (2002).

[19] *Id*.; *Schueler v Weintrob*, 360 Mich 621, 633-634; 105 NW2d 42 (1960).

[20] 42 USC 7475; 42 USC 7479(2)(C); 42 USC 7411(a)(4) (defining "modification"); *Alaska Dep't of Environmental Conservation v Environmental Protection Agency*, 540 US 461, 472; 124 S Ct 983; 157 L Ed 2d 967 (2004).

[21] MCL 324.5512(1)(b).

[22] Mich Admin Code, R 336.2802(3).

[23] Mich Admin Code, R 336.2817(2)(e); see also 42 USC 7475(a)(2), (4).

[24] Mich Admin Code, R 336.2817(2)(f).

C. BEST AVAILABLE CONTROL TECHNOLOGY

Among other requirements, an analysis of the best available control technology must be conducted and the facility must be "subject to the best available control technology for each pollutant subject to regulation under [chapter 85 of the Act, 42 USC 7401 through 7671q] . . . ."[25] The Clean Air Act defines "best available control technology" as

> an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under [chapter 85 of the Act] emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.[26]

A state's permitting agency has broad authority to determine what is "maximum" and "achievable."[27]

D. APPLYING THE STANDARDS

As an initial matter, we note that *whether* the Department considered clean fuels, or should have considered a specific blend of fuels, is not at issue in this appeal. Petitioners' contention is that the Department's decision was not authorized by law because it did not *adequately* consider fuels. We conclude that the Department did conduct an adequate best available control technology analysis.

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[25] 42 USC 7475(a)(3), (4); see also Mich Admin Code, R 336.2810(3).

[26] 42 USC 7479(3); see also Mich Admin Code, R 336.2801(f).

[27] *Alaska Dep't of Environmental Conservation*, 540 US at 485, 490.

Petitioners primarily base their argument on the Department's failure to follow the "top-down" model of conducting the best available control technology analysis. The "top-down" method supplied in the Environmental Protection Agency's *New Source Review Workshop Manual*[28] is a common approach to determining the best available control technology.[29] Under this method, the applicant ranks all available control technologies from best to worst.[30] "The most stringent technology is [the best available control technology] unless the applicant can show that it is not technically feasible, or if energy, environmental, or economic impacts justify a conclusion that it is not achievable."[31]

However, this method is not mandatory.[32] Because the top-down method is not required by the Clean Air Act, whether the Department complied with or failed to comply with this model does not determine whether the Department's issuance of the permit was authorized by law.

Considering the discretion afforded to state permitting authorities, the United States Supreme Court has stated that "[o]nly when a state agency's [best available control technology] determination is 'not based on a reasoned analysis' may [the United States Department of Environmental Protection] step in to ensure that the

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[28] Environmental Protection Agency, *New Source Review Workshop Manual: Prevention of Significant Deterioration and Nonattainment Area Permitting* (October, 1990 draft), available at <http://www.epa.gov/NSR/ttnnsr01/gen/wkshpman.pdf> (accessed March 21, 2013).

[29] *Alaska Dep't of Environmental Conservation v United States Environmental Protection Agency*, 298 F3d 814, 822 (CA 9, 2002), aff'd 540 US 461.

[30] *Id*.

[31] *Id*.

[32] *Id*.

statutory requirements are honored."[33] This implies—and we conclude—that a reasoned analysis that does take into account the considerations the statute enumerates is statutorily sufficient. Indeed, the type of framework the Department employs to determine the best available control technology is *exactly* the sort of determination best entrusted to an agency's expertise.

We conclude that the Department complied with the requirements of the federal Clean Air Act because the analysis provided a reasoned analysis of each type of fuel that the facility could utilize without major modifications. Though "clean fuels" is one of the control methods the Department must consider under the Act, the Act does not generally require a facility to redesign itself to use the *cleanest* fuels.[34] In this case, the analysis considered every type of fuel the proposed boiler could use, including wood and biomass, which the Sierra Club specifically recommended be analyzed as "clean fuels." Combined, the analysis considered how this variety of fuels, in combination with other processes, systems, and techniques, affected regulated emissions like particulate matter and carbon monoxide. Because the Department's analysis included those "clean fuels" that Holland's plant could use, we conclude that the analysis adequately considered clean fuels under the federal Clean Air Act.

We conclude that the Department's decision did not violate 42 USC 7479(3) and, therefore, that the permit to install was authorized by law. Accordingly, the trial court properly affirmed the Department's issuance of the permit.

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[33] *Alaska Dep't of Environmental Conservation*, 450 US at 490.

[34] See *Sierra Club v United States Environmental Protection Agency*, 499 F3d 653, 655 (CA 9, 2007).

## V. CONCLUSIONS

For the reasons we have detailed, we conclude that this Court has subject-matter jurisdiction to hear an appeal of right from the circuit court's decision to affirm a permit when a party has appealed to the circuit court under MCL 324.5505(8). We also conclude that the circuit court properly determined that the Department's action was authorized by law, and did not apply an unduly deferential standard when doing so.

We affirm.

MURRAY, P.J., and MARKEY and WHITBECK, JJ., concurred.

*In re* MORRIS

Docket No. 312248. Submitted March 12, 2013, at Detroit. Decided March 21, 2013, at 9:10 a.m. Leave to appeal denied, 494 Mich 851.

The Department of Human Services (DHS) filed a temporary-custody petition in the Wayne Circuit Court, Family Division, seeking jurisdiction over C. I. Morris, a minor who was the daughter of N. Brumley (the mother) and D. Morris (the father), after the newborn tested positive for cocaine. At the preliminary hearing, both parents indicated that they had Indian heritage, but tribal notice of the action was not made in accordance with the notice provision of the Indian Child Welfare Act (ICWA), 25 USC 1912(a). The court, Mark T. Slavens, J., assumed jurisdiction over the child and subsequently terminated both parents' parental rights. The parents appealed, and the DHS raised sua sponte the insufficiency of the tribal notice and urged the Court of Appeals to conditionally affirm the termination but remand the matter so that proper notice could be provided to any interested tribe. The Court of Appeals, WHITBECK, P.J., and O'CONNELL and WILDER, JJ., affirmed the termination in an unpublished opinion per curiam, issued February 17, 2011 (Docket Nos. 299470 and 299471), without addressing the DHS's admission of error. The father applied for leave to appeal in the Supreme Court. In lieu of granting leave to appeal, the Supreme Court vacated the portion of the Court of Appeals' judgment that resolved his appeal and remanded the case to the Court of Appeals for resolution of the tribal-notice issue, retaining jurisdiction. 489 Mich 877 (2011). On remand, the Court of Appeals, in an unpublished opinion per curiam, issued May 19, 2011 (Docket Nos. 299470 and 299471), readopted its previous opinion with regard to termination of the father's parental rights, conditionally affirmed the termination of parental rights with regard to both parents, and remanded the case to the trial court for resolution of the notice issue. The Supreme Court then granted the father leave to appeal, limited to the issue whether conditional affirmance was an appropriate remedy. 489 Mich 957 (2011). The Supreme Court determined that conditional reversal was more consistent with ICWA and more deferential to tribal interests than conditional affirmance and overruled *In re IEW*, 233 Mich App 438 (1999), and its progeny,

adopting the conditional-reversal remedy for violations of ICWA's notice requirements. The Supreme Court reversed the Court of Appeals' judgment, conditionally reversed the trial court's termination of the father's parental rights, and remanded the case to the trial court for resolution of the ICWA notice matter, directing the trial court to ensure that the appropriate tribal entities received notice of the proceedings in compliance with ICWA. The Supreme Court emphasized that the trial court's order terminating parental rights would be reinstated if the trial court found that ICWA did not apply because (1) the child was not Indian or (2) the tribes receiving proper notice did not respond within the allotted time. 491 Mich 81 (2012). On remand, the DHS sent notices containing all the genealogical information it had been able to obtain from the parents to three federally recognized Indian tribes and the Bureau of Indian Affairs (BIA). The BIA indicated that it would take no further action, one tribe indicated that it would not intervene in the proceeding because it found no evidence that the child was a descendant of its band, and a second tribe did not respond. The Cherokee Nation stated that the information provided to it was not complete, to which the DHS replied that it was unable to obtain most of the additional information sought. The Cherokee Nation did not respond further. The trial court referee concluded that the DHS had complied with the notice requirements of ICWA. The trial court agreed with the referee's recommendation and entered an order reinstating its earlier order that terminated the father's parental rights, and he appealed.

The Court of Appeals *held*:

1. 25 USC 1912(a) provides that if a court knows or has reason to know that an Indian child is involved, no foster care placement or termination-of-parental-rights proceeding may be held until at least 10 days after receipt of notice of the proceeding by the parent or Indian custodian and the tribe or the Secretary of the Interior (in the form of the BIA in most instances). The father claimed on appeal that the DHS failed to make diligent efforts to obtain the information about his family that the Cherokee Nation had requested so that the tribe could determine the child's tribal eligibility or status. He argued that the ancestry information the DHS provided did not meet the BIA's guidelines or ICWA's requirements. There is no requirement under ICWA, the BIA's regulations, or Michigan caselaw, however, that the DHS conduct independent research to obtain a parent's detailed genealogical information, nor is there anything in the guidelines addressing genealogical information that should be included in the notice. The BIA's regulations, 25 CFR 23.11(a) and (d), require that the notice

include ancestry information if known. Similarly, the Supreme Court indicated that the trial court could direct the DHS to send a notice containing as much information as was reasonably available. The DHS gathered all the information that was reasonably available by interviewing both parents after they had been given an opportunity to confer with relatives. The father confirmed to the trial court that he had no further information to provide other than what had already been submitted to the tribes, and he did not move for reconsideration to present additional information. He neither claimed on appeal to have any additional information to give the tribes nor identified where he could get more information. Because all known information was provided to the tribes and the father did not show that any new information was available or would result in a different tribal determination, he did not demonstrate error requiring reversal.

2. The DHS was not responsible for locating information that the father was unable to find. 25 USC 1912(a) does not require that a detailed family tree be provided. Nothing in the record indicated that the child was eligible for membership in an Indian tribe, and both the DHS and the trial court satisfied their obligations under ICWA. The burden then shifted to the father to prove that ICWA nonetheless applied, which he failed to do. Since he could not obtain any additional information regarding his relatives, it would have been unreasonable to expect the DHS to find it. Imposing this burden on the DHS would also encourage parents, who can best research their own ancestry, to delay the proceedings by providing limited information. Because it would often take a long time to uncover ancestry details, a requirement that notices include every detail of a child's ancestry would also undermine ICWA's 10-day-response provision, which prevents unreasonable delays. The trial court did not err by finding that there was compliance with ICWA's notification requirements.

3. There was no error in the trial court's determination under MCL 712A.19b(5) that termination was in the child's best interests. The issue of the child's best interests was not properly before the Court of Appeals in this appeal because it was outside the scope of the Supreme Court's limited remand. The Court of Appeals had already determined that the trial court did not err by finding that termination of parental rights was in the child's best interests, and the Supreme Court had agreed. A remand to ensure proper notice under ICWA that does not lead to any evidence that ICWA applies does not unravel a best-interest determination.

4. The father's due process rights were not violated. Due process is about fundamental fairness. Due process in civil cases

requires that a party have the chance to know and respond to the evidence. The father was able to participate in the proceedings and was informed that the Cherokee Nation had requested more information about his family history well in advance of the hearing. He never claimed that he had any new information to provide the tribe and did not present any on appeal. Notice under ICWA does not require the trial court or the DHS to demand a response from the tribes notified. In this case, notice to the tribes was properly provided under ICWA, no tribe sought a request for more time to prepare for the proceedings, and the father was given ample time to investigate, uncover, and provide any family information that he could.

Affirmed.

CHILD CUSTODY — INDIAN CHILD WELFARE ACT — NOTICE TO TRIBES — REQUIREMENTS.

The Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., provides that if a court knows or has reason to know that an Indian child is involved, no foster care placement or termination-of-parental-rights proceeding may be held until at least 10 days after receipt of notice of the proceeding by the parent or Indian custodian and the tribe or the Secretary of the Interior; the applicable regulations require that the notice include ancestry information if known, but the regulations and applicable guidelines do not address genealogical information that should be included in the notice, and a detailed family tree need not be provided; there is no requirement that the Department of Human Services (DHS) conduct independent research to obtain a parent's detailed genealogical information, and the DHS is not responsible for locating information that a parent is unable to find; if both the DHS and the trial court satisfy their notice obligations under ICWA and nothing in the record indicates that the child is eligible for membership in an Indian tribe, the burden shifts to the parent to prove that ICWA nonetheless applies (25 USC 1912[a]; 25 CFR 23.11[a], [d]).

*Bill Schuette*, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Jonathan E. Duckworth*, Assistant Attorney General, for the Department of Human Services.

*Steven A. Menken* for D. Morris.

*Judith T. New* for C. I. Morris.

Before: MURPHY, C.J., and O'CONNELL and BECKERING, JJ.

PER CURIAM. Respondent appeals by right the trial court's order terminating his parental rights to the minor child. Because the trial court correctly determined that proper notice was given as required by the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., and that ICWA does not apply to this child-custody proceeding, we affirm.

## I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case has a rather extensive history in the appellate system. In July 2010, following a termination hearing, the trial court terminated respondent's parental rights, as well as the rights of the minor child's mother. On February 17, 2011, this Court issued an opinion per curiam affirming the trial court's order terminating parental rights. *In re Morris*, unpublished opinion per curiam of the Court of Appeals, issued February 17, 2011 (Docket Nos. 299470 and 299471).

Acting *in propria persona*, respondent filed an application for leave to appeal in the Michigan Supreme Court. On April 22, 2011, the Supreme Court vacated the part of this Court's judgment that resolved respondent's appeal and remanded the case to this Court for reconsideration of respondent's appeal in light of petitioner's confession of error regarding the failure of petitioner and the trial court to comply with the notice requirements of ICWA. *In re Morris*, 489 Mich 877 (2011).

On May 19, 2011, this Court readopted, but conditionally affirmed, the order terminating respondent's parental rights and remanded the case to the trial court for proper notice consistent with ICWA and for further

proceedings as necessary and consistent with the opinion. *In re Morris (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2011 (Docket Nos. 299470 and 299471).

On June 22, 2011, the Supreme Court, noting that it had retained jurisdiction in its April 22, 2011, order, issued an order granting respondent's application for leave to appeal, "limited to the issue whether the Court of Appeals' 'conditional affirmance' remedy is an appropriate method of resolving an ICWA violation." *In re Morris*, 489 Mich 957 (2011). On May 4, 2012, the Supreme Court determined that a conditional reversal was more consistent with the text of ICWA than conditional affirmance and more deferential to tribal interests. *In re Morris*, 491 Mich 81, 121; 815 NW2d 62 (2012). Overruling *In re IEM*, 233 Mich App 438; 592 NW2d 751 (1999), and its progeny, the Court adopted the conditional-reversal remedy for violations of the ICWA notice requirements. *Morris*, 491 Mich at 121. The Court reversed this Court's judgment, conditionally reversed the trial court's termination of respondent's parental rights, and remanded the case to the trial court for resolution of the ICWA notice matter. *Id.* at 122. The Court directed the trial court to ensure that the appropriate tribal entities receive notice of the proceedings in compliance with ICWA.[1] *Id*. at 123. The Court emphasized that the trial court's order terminating parental rights would be reinstated if the trial court found that ICWA does not apply because (1) the minor child is not Indian or (2) the properly noticed tribes do not respond within the allotted time. *Id*.

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[1] Both respondent and the minor child's mother informed the trial court at the December 11, 2008, preliminary hearing that they had Cherokee Indian heritage, which the Supreme Court deemed sufficient to trigger the tribal-notice requirement of ICWA. *Morris*, 491 Mich at 109.

On June 4, 2012, the trial court referee held a hearing to comply with the Supreme Court's directives. Petitioner produced and admitted into evidence copies of notices it intended to send to three federally recognized Cherokee Indian tribes (United Keetoowah Band of Cherokee Indians in Oklahoma, Eastern Band of Cherokee Indians, and the Cherokee Nation) and the Department of the Interior's Bureau of Indian Affairs (BIA) Midwest Regional Office.[2] Emiline Reyst, the adoption caseworker tasked with issuing the notices, advised the court that the notices contained all the genealogical information she had been able to obtain from respondent and the minor child's mother.[3] The referee continued the hearing for six weeks and directed petitioner to continue to make efforts to comply with ICWA.

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[2] The notices contain genealogical information including the minor child's full name, date and place of birth, and claimed heritage as a Cherokee Indian; respondent's full name, date and place of birth, address, and claimed heritage as a Cherokee Indian; the mother's full name, date and place of birth, address, and claimed heritage as a Cherokee Indian; the paternal grandfather's full name, date and place of birth, date and place of death, and claimed heritage as a Cherokee Indian; the paternal grandmother's name and date and place of birth, the fact that she is deceased, her place of death, and an acknowledgement that she was not a Native American; the maternal grandfather's full name, date of birth, city and state of residence, and claimed heritage as a Cherokee Indian; the maternal grandmother's name, including her maiden name, and an acknowledgment that she is not a Native American; a paternal great-grandfather's name, place of birth, place of death, and claimed heritage as a Native American; a paternal great-grandmother's name, place of birth, and place of death and an acknowledgement that she was not a Native American; and a maternal great-grandmother's name, place of death, and claimed heritage as a Native American.

[3] Respondent and his attorney attended the hearing. The attorney for the minor child's mother also attended; however, the mother did not. Reyst advised the court that she had sent out 16 letters to as many addresses trying to find the mother and finally connected with her by telephone on May 30, 2012, at which point the mother gave Reyst "everything she knew" about the child's Indian heritage.

On July 16, 2012, the trial court reconvened for a continued hearing on the ICWA conditional reversal. Petitioner produced and admitted into evidence "a thick stack of documents" that included copies of the notices that were sent to the tribes, registered-mail return receipts and other proof of service to show that all the notices were mailed on June 4, 2012, and received by the recipients by June 8, responses received from the tribes, and other correspondence between the caseworker and the tribes.

The records submitted by petitioner reveal that the BIA responded to the notice and indicated that it would take no further action because the appropriate tribe was notified. The United Keetoowah Band of Cherokee Indians in Oklahoma also responded and indicated that it did not intend to intervene in the case because it found no evidence that the child was a descendant of its band. The Eastern Band of Cherokee Indians received the notice but did not initially respond. The Cherokee Nation responded in a June 14, 2012, letter, indicating that the information provided was "not complete" and did not meet the BIA guidelines. It requested further information in order to verify Cherokee heritage, including the middle names of the paternal relatives, birthdays of everyone involved and their relationship to the child, and the maiden names of the women listed. Reyst attempted to obtain the requested information from respondent, but respondent had no further information.[4] On June 22, 2012, Reyst sent an e-mail response to the Cherokee Nation explaining her efforts to obtain the additional information sought and indicating

[4] Reyst indicated to the court that she received the Cherokee Nation's letter on June 21, 2012, and called respondent that day to obtain the requested information. Respondent returned her call the same day and left a message indicating that he could not get the information because he had no one to get it from and had no knowledge of it.

that she was not able to provide it, other than the fact that the minor child's paternal great-grandfather had no middle name. In her e-mail, Reyst asked the Cherokee Nation to let her know if it needed anything else; she did not receive a response.

At the July 16, 2012, hearing, the referee confirmed with respondent that respondent had no further information to provide. The referee noted that more than 10 days had passed since Reyst's last communication with the Cherokee Nation and, thus, deemed petitioner to have complied with the notice requirements of ICWA.

Respondent's attorney indicated that he had just received the Cherokee Nation's letter that day and, if given more time, could conduct an investigation to see if he could obtain the requested information. Respondent's counsel argued that more time should be given to protect the respondent's due-process rights. The referee concluded that proper notice had been given and resulted in "absolutely no indication today, after ample notice and full compliance with the ICWA notice requirements, that [the minor child] is a member or eligible for membership in any Native American tribe to which ICWA would apply." The trial court agreed with the referee's recommendation and entered an order on August 9, 2012, reinstating its earlier order terminating respondent's parental rights.

On August 14, 2012, the trial court held a hearing at which it admitted into evidence a letter from the Eastern Band of Cherokee Indians.[5] The letter states that, given the information provided, the band did not intend to intervene because it did not consider the minor child to be an "Indian child" under ICWA.

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[5] This Court does not have a transcript of the hearing because, apparently, no transcript has been created. Nevertheless, the parties do not contend that the hearing is pertinent to this appeal.

II. STANDARD OF REVIEW

This Court reviews de novo questions of law involving the interpretation and application of ICWA. *In re JL*, 483 Mich 300, 318; 770 NW2d 853 (2009). This Court reviews for clear error a trial court's factual findings underlying the application of legal issues. *Morris*, 491 Mich at 97.

III. ANALYSIS

As the Supreme Court previously noted in this matter, "before a state court can determine whether ICWA applies to the proceedings, the court must first make the critical determination whether the child is an 'Indian child.' " *Id*. at 99-100; see also MCR 3.965(B)(2). "[I]t is well established that only [an] Indian tribe can determine its membership. Therefore, when there are sufficient indications that the child may be an Indian child, the ultimate determination requires that the tribe receive notice of the child custody proceedings, so that the tribe may advise the court of the child's membership status." *Morris*, 491 Mich at 100 (citation omitted). In this case, both respondent and the minor child's mother informed the trial court at the December 11, 2008, preliminary hearing that they had Cherokee Indian heritage, which the Supreme Court deemed sufficient to trigger the tribal-notice requirement of ICWA. *Id*. at 109.

The notice provision of ICWA provides:

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.

> If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary[6] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. *No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary*: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding. [25 USC 1912(a) (emphasis before colon added).]

In his brief on appeal, respondent claims for the first time that petitioner failed to make diligent efforts to obtain the information about his family that was requested by the Cherokee Nation so that the tribe could determine the minor child's tribal eligibility or status. Respondent argues that the ancestry information provided by petitioner did not meet the BIA guidelines or the requirements of ICWA. These contentions are unsupported by the law. There is no requirement under ICWA, the BIA's regulations, or Michigan caselaw that petitioner conduct independent research to obtain a parent's detailed genealogical information. There is nothing in the guidelines addressing genealogical information that should be included in the notice. The BIA adopted regulations requiring notice to include ancestry information *if known*. 25 CFR 23.11(a) and (d). Similarly, the Supreme Court in this case noted that a trial court could direct the petitioner "to compose and send notice containing as much information as is *reasonably available* . . . ." *Morris*, 491 Mich at 124 (emphasis added).

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[6] " 'Secretary' is defined as 'the Secretary of the Interior.' 25 USC 1903(11). Pursuant to 25 CFR 23.11(b) and (c)(2), when notice to the Secretary of the Interior is required under 25 USC 1912(a) for proceedings in Michigan, it is actually sent to the Minneapolis Area Director, Bureau of Indian Affairs." *Morris*, 491 Mich at 103 n 14.

The record reveals that petitioner gathered all the information that was reasonably available by interviewing both respondent and the child's mother after they were given an opportunity to confer with relatives. Reyst interviewed respondent several times about his ancestry, and respondent confirmed to the court that he had no further information to provide other than what had already been submitted to the tribes. Respondent did not move the trial court for reconsideration to present additional information. And now, on appeal, respondent neither claims to have any additional information to provide to the tribes nor identifies where he can get more information. Because all known information was provided to the tribes and respondent has not shown that any new information is available or would result in a different tribal determination, respondent has not shown error requiring reversal.

Respondent's argument that petitioner is responsible for locating information that he has been unable to find is unpersuasive. The notice requirement of 25 USC 1912(a) does not require that a detailed family tree be provided. There is nothing in the record to indicate that the minor child is eligible for membership in an Indian tribe, and both petitioner and the trial court satisfied their obligations under ICWA. The burden then shifted to respondent to prove that ICWA nonetheless applied, which he failed to do. See *In re TM (After Remand)*, 245 Mich App 181, 187; 628 NW2d 570 (2001) ("If proper notice is provided and a tribe fails to either respond or intervene in the matter, the burden shifts to the parties (i.e., the parents) to show that the ICWA still applies."), overruled on other grounds by *Morris*, 491 Mich 81; see also *IEM*, 233 Mich App at 449 (" 'Only after notice has been provided and a tribe has failed to respond or has intervened but is unable to determine the child's eligibility for membership does the burden shift to the

parties to show that the ICWA still applies.' ") (citation omitted), overruled on other grounds by *Morris*, 491 Mich 81. Since respondent could not obtain any additional information regarding his relatives, it would be unreasonable to expect petitioner to find it. Imposing this burden on petitioner would also encourage parents, who can best research their own ancestry, to delay the proceedings by providing limited information. Because it would often take a long time to uncover ancestry details, a requirement that ICWA tribal notices include every detail of a child's ancestry would undermine ICWA's 10-day provision, which prevents unreasonable delays. It would also jeopardize concepts of permanency and finality. The trial court did not err by finding that there was compliance with ICWA's notification requirements.

Respondent also argues that it was not in the child's best interests to terminate respondent's parental rights under MCL 712A.19b(5). He claims that because the ICWA notice violation delayed the child's permanency, that delay was contrary to the child's best interests. Respondent asserts that ICWA's remedy provisions permit him to petition for invalidation of court orders entered in violation of ICWA's notice requirement; thus, he requests that the case be remanded to determine whether the minor child is an Indian child. However, respondent has not established that ICWA's notice requirement was violated on remand or that ICWA actually applies to the minor child. Moreover, the issue of the minor child's best interests is not properly before this Court because it is outside the scope of the Supreme Court's limited remand. This Court already determined that the trial court did not err by finding that termination of respondent's parental rights was in the child's best interests, and the Michigan Supreme Court agreed. Thus, there was no error in the trial court's best-interest determination. A remand to en-

sure proper notice under ICWA that does not lead to any evidence that ICWA applies does not unravel a best-interest determination.

Finally, respondent argues that his due-process rights were violated when he was unable to obtain an adjournment at the July 16, 2012, hearing in order to obtain additional information. Respondent's argument lacks merit. Due process is about fundamental fairness. *In re Beck*, 287 Mich App 400, 401-402; 788 NW2d 697 (2010). Due process in civil cases requires that a party have the chance to know and respond to the evidence. *Traxler v Ford Motor Co*, 227 Mich App 276, 288; 576 NW2d 398 (1998). Respondent was able to participate in the proceedings and was informed that the Cherokee Nation had requested more information about his family history on June 21, 2012 (the same day the caseworker received the request for information), well in advance of the July 16, 2012, hearing. Respondent has never claimed to have had any new information to provide the tribe, and he does not present any on appeal. Furthermore, Reyst responded to the Cherokee Nation's request for more information on June 22 and clarified that she had nothing more to provide, at which time the Cherokee Nation took no further action. Notice under ICWA does not require the court or petitioner to demand a response from the tribes notified. Notice to the tribes was properly provided under ICWA, no tribe sought a request for more time to prepare for the proceedings, and respondent was given ample time to investigate, uncover, and provide any family information that he could. Thus, there was no due-process violation.

Affirmed.

MURPHY, C.J., and O'CONNELL and BECKERING, JJ., concurred.

KNIGHT v NORTHPOINTE BANK

Docket No. 310206. Submitted January 15, 2013, at Lansing. Decided January 24, 2013. Approved for publication March 26, 2013, at 9:00 a.m. Leave to appeal denied, 494 Mich ___.

Cheryl Knight brought an action in the Kalkaska Circuit Court against Northpointe Bank and NPB Mortgage, LLC, seeking to quiet title to real property and a determination that plaintiff owns the property free of any claim by defendants, the purchasers of the property at a sheriff's sale following foreclosure of a mortgage on the property. Defendants sought summary disposition on the bases that plaintiff's complaint was untimely under the applicable statute of limitations and under the equitable doctrine of laches. The court, Janet M. Allen, J., dismissed the claim as untimely under the doctrine of laches. Plaintiff appealed.

The Court of Appeals *held*:

Although considerations of timing are important when determining whether laches applies to the facts, application of laches is not triggered by the passage of time alone. It is the prejudice occasioned by the delay that justifies the application of laches. Given the record evidence that plaintiff delayed suing for years after the point at which she knew or should have known of her claim and that the defendants' ability to defend against the suit was severely prejudiced by the delay, it cannot be concluded that the trial court erred when it dismissed plaintiff's claim on the basis of laches. Under the circumstances of this case, the fact that the defendants knew, or at least should have known, that plaintiff's sister had transferred the property from their mother to herself using a power of attorney from her mother did not preclude defendants from asserting laches as a defense. Laches can apply even though, as in this case, the applicable period of limitations has not expired. Plaintiff did not have a vested right to the property that would render laches inapplicable.

Affirmed.

1. EQUITY — LACHES.

A court sitting in equity may withold relief when a plaintiff has not exercised reasonable diligence in vindicating his or her rights on the

ground that the plaintiff is chargeable with laches; although considerations of timing are important when determining whether laches applies to the facts, laches is not triggered by the passage of time alone; mere delay in attempting to enforce a right does not constitute laches because, to constitute laches, it must further appear that the delay resulted in prejudice to the party claiming laches of such character so as to render it inequitable to enforce the right.

2. EQUITY — LACHES.

Laches is an equitable tool used to provide a remedy for the inconvenience resulting from a plaintiff's delay in asserting a legal right that was practicable to assert.

3. AGENCY — TRANSFERS OF PRINCIPAL'S PROPERTY TO AGENT.

An agent generally cannot use his or her agency to transfer the principal's property to the agent; where an agent's transfer is not inconsistent with the agent's duty to the principal, the agent may make such a transfer.

4. EQUITY — LACHES — LIMITATION OF ACTIONS — REAL PROPERTY — VESTED RIGHTS.

Laches can apply even though the period of limitations applicable to an action has not expired; laches may be inapplicable to a plaintiff having vested rights to real property at issue in an action because the plaintiff has no obligation to assert his or her rights to the property as against some third party since the world is on notice of the plaintiff's good title.

*Robert Kaufman* for plaintiff.

*The Gallagher Law Firm, PLC* (by *Peter C. Brown*), for defendants.

Before: SAWYER, P.J., and MARKEY and M. J. KELLY, JJ.

PER CURIAM. In this real property dispute, plaintiff, Cheryl Knight, appeals as of right the trial court's order dismissing her complaint for title to the disputed property free of any claim by defendants, Northpointe Bank and NPB Mortgage, LLC (collectively the Bank). On appeal, we must determine whether the trial court erred when it determined that Knight's claim was

untimely under the equitable doctrine of laches. Because we conclude that the trial court did not err when it applied laches to bar Knight's claim, we affirm.

## I. BASIC FACTS

Knight's mother, Laurene Marian Coe, was a partner in Laurendal Enterprises, which owned 240 acres of real property in Kalkaska County, Michigan. In November 1997, Coe and another partner caused the partnership to transfer ownership of the property to Coe in her individual capacity through a warranty deed. Coe was a widow at the time and living in Florida.

Knight's sister, Charlene Diane Cutro, lived in Ann Arbor, Michigan. At some point before June 2001, Coe executed a power of attorney that gave Cutro the authority to transfer Coe's real property in Michigan.

In June 2001, Cutro executed a warranty deed on Coe's behalf that transferred 200 acres of the original property to Cutro. At the same time, Cutro used her power of attorney to grant herself an easement over that portion of a trail that crossed through the remaining 40 acres. The easement described a right of way "following the existing trail" that was 15-feet wide; the easement was for ingress and egress only.

In February 2002, Coe executed a warranty deed transferring the remaining 40 acres to Knight along with an easement for ingress and egress. The 40-acre parcel included a house, pole barn, and shed. The easement covered a 15-foot right of way that followed an existing trail that wound over parts of both the 40-acre parcel and the 200-acre parcel. Coe executed the warranty deed and easement in Florida.

In June 2003, Coe executed two new warranty deeds—both on the same day—covering the same 240 acres that

she had already conveyed to her daughters, Cutro and Knight. In the deeds, Coe again transferred 200 acres to Cutro and 40 acres to Knight, but she also provided for an easement that differed from that contained in the original transfers: it was now 66 feet wide, 33 feet on either side of a line described in the deed, rather than 15 feet wide, and the easement was for ingress, egress, and utilities.[1]

In March 2005, Cutro borrowed $180,000 from the Bank. To secure the repayment of the debt, Cutro granted the Bank a mortgage on the 200 acres that she obtained from her mother. In October of the same year, Cutro transferred the 200-acre parcel to her trust.

Cutro died in October 2006 and Coe died in February 2007.

In August 2007, Cutro's daughter, Edith Enders, acting as the successor trustee of her mother's trust, transferred the 200-acre parcel to herself. Thereafter, Enders made payments on the Bank's note, but she fell into arrears.

The Bank foreclosed on the 200-acre parcel and purchased it at a sheriff's sale in September 2010 for more than $193,000. The redemption period for the 200-acre parcel expired in October 2011 and the Bank began to seek a purchaser for the property.

In November 2011, Knight sued the Bank. In her complaint, Knight alleged that her sister, Cutro, was "disabled as a matter of law" from making the "self-dealing conveyance" of the 200-acre parcel to herself as the attorney-in-fact for her mother. Moreover, because the "defect" in Cutro's title was "plain on the face of the

[1] The legal description for the 40-acre parcel used in the 2003 deeds varied from that used in the 2001 and 2002 deeds in some respects but still covered the area with the house and pole barn.

public record," the Bank could not claim to be a bona fide purchaser from Cutro. On the basis of these allegations, Knight asked the trial court to "decree" that she was the rightful owner of the property and that she owned it free of any claims by the Bank.

In March 2012, the Bank moved for summary disposition under MCR 2.116(C)(7). The Bank argued that Knight's complaint was untimely under the applicable statute of limitations and under the equitable doctrine of laches. The trial court disagreed with the Bank's contention that the applicable period of limitations had expired,[2] but agreed that Knight's decision to wait so long to sue prejudiced the Bank. Accordingly, in an opinion and order signed in April 2012, the trial court dismissed Knight's claim as untimely under the doctrine of laches.

This appeal followed.

## II. SUMMARY DISPOSITION

### A. STANDARD OF REVIEW

Knight argues on appeal that the trial court erred when it dismissed her claim under the equitable doctrine of laches. This Court reviews de novo a trial court's decision to grant summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo a trial court's decision to apply equitable doctrines such as laches. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005).

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[2] The trial court held that the applicable period was the 15-year period provided under MCL 600.5801(4). The bank has not cross-appealed that determination. Accordingly, the application of MCL 600.5801(4) to this case is not at issue on appeal.

B. LACHES

With her complaint, Knight challenged whether Cutro validly transferred the 200 acres owned by their mother to herself. She also asked the trial court to determine, on that basis, that she owned the 200 acres free of any claim by the Bank. Thus, although she did not refer to her claim as one to quiet title, it is evident that Knight invoked the trial court's equitable power to quiet title. *Beach v Lima Twp*, 489 Mich 99, 106; 802 NW2d 1 (2011).

As our Supreme Court has explained, a complainant in equity must come to the court with a clean conscience, in good faith, and after acting with reasonable diligence: " 'Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these are wanting the court is passive, and does nothing.' " *Henderson v Connolly's Estate*, 294 Mich 1, 19; 292 NW 543 (1940), quoting *Campau v Chene*, 1 Mich 400, 405 (1850). If a plaintiff has not exercised reasonable diligence in vindicating his or her rights, a court sitting in equity may withhold relief on the ground that the plaintiff is chargeable with laches. *Lothian v Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982). "[W]hen laches appears, the court merely leaves the parties where it finds them." *Duck v McQueen*, 263 Mich 325, 328; 248 NW 637 (1933). This is so because equity will not lend aid to those who are not diligent in protecting their own rights. *Mogk v Stroecker*, 243 Mich 668, 672; 220 NW 730 (1928). The rule that equity aids the vigilant is designed to discourage laches by making it a bar to relief and to prevent the enforcement of stale demands. *Henderson*, 294 Mich at 19.

Although considerations of timing are important when determining whether laches applies to the facts, laches is not triggered by the passage of time alone.

*Lothian*, 414 Mich at 168. Laches is an equitable tool used to provide a remedy for the inconvenience resulting from the plaintiff's delay in asserting a legal right that was practicable to assert. *Dep't of Pub Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996). As such, "when considering whether a plaintiff is chargeable with laches, we must afford attention to prejudice occasioned by the delay." *Lothian*, 414 Mich at 168. It is the prejudice occasioned by the delay that justifies the application of laches. *Dunn v Minnema*, 323 Mich 687, 696; 36 NW2d 182 (1949) ("This Court has repeatedly held that mere delay in attempting to enforce a right does not constitute laches, but that it must further appear that the delay resulted in prejudice to the party claiming laches of such character as to render it inequitable to enforce the right.").

C. APPLYING THE LAW

Here, Knight sued to quiet title to the 200-acre parcel at issue more than 10 years after the transfer that she claims was invalid. During that 10-year period, the property was transferred several times: Cutro transferred it to herself using the power of attorney from her mother in June 2001, Coe executed a deed transferring a similarly described 200-acre parcel to Cutro in June 2003, Cutro transferred the property to her trust in 2005, Enders transferred the property to herself after her mother's death, and the Bank foreclosed on and purchased the property at a sheriff's sale in 2010. These transfers were recorded and, therefore, a matter of public record. In addition, each transfer contained a right of first refusal that named Knight (among others) and required notice before the property could be sold. Coe also transferred the adjacent 40-acre parcel to Knight just months after Cutro transferred the 200-

acre parcel to herself using the power of attorney and Coe transferred the 240 acres involved here to Cutro and Knight along with a revised easement in 2003. Thus, Cutro and Knight were, in effect, neighbors for more than eight years before Knight's decision to sue.

Given the evidence, Knight had to have been aware that her sister, and later her niece, had possession of the 200 acres that neighbored her 40-acre parcel and that they had possession under a claim of title. She could easily have asserted her claim against either her sister, before she died, or her niece. Yet, she chose not to do so; she did not assert her rights when her sister took possession of the property, did not assert her rights when her sister mortgaged the property and transferred it to her trust, and did not assert her rights when her niece transferred the property into her own name. Moreover, Knight did not, and has not, offered any reason for her decision to delay suit until after the Bank acquired the property. Knight's apparent knowledge of the facts and circumstances surrounding these transfers suggests that she deliberately chose to sleep on her rights while her sister, and later her niece, had possession of the property at issue. See *Campau v Van Dyke*, 15 Mich 371, 378-379 (1867) (stating that the plaintiff must show that he or she is "prompt and eager for redress, and any delay must be accounted for and excused").

Moreover, Knight's decision to delay suing until after the Bank acquired the property at the sheriff's sale plainly prejudiced the Bank's ability to defend itself against Knight's lawsuit. During the 10-year delay, the two most important witnesses to the underlying facts died. Had Knight sued before her sister died, Cutro could have provided evidence that her mother actually authorized her to transfer the property to herself using

the power of attorney. Cutro may also have been able to produce a copy of the power of attorney that showed that her mother specifically authorized her to make the transfer. Coe too could easily have cleared up whether she authorized her daughter to use the power of attorney to transfer the property. By waiting to sue until after the deaths of her sister and her mother, Knight seriously prejudiced the Bank's ability to obtain evidence to support its position. Under such circumstances, Michigan courts will apply laches to bar the plaintiff's request for relief. See *German American Seminary v Kiefer*, 43 Mich 105, 111; 4 NW 636 (1880) ("[I]t would be the height of injustice to permit complainant, with full knowledge of the facts, to delay suit while the persons who were familiar with the facts were one by one passing away, and at last bring suit under circumstances which at the best must leave the court in doubt whether the remaining evidence does not disclose a partial, defective and misleading case."); *Campau*, 15 Mich at 380-381 (holding that laches barred the claims because the deceased witnesses "must have been more intimately acquainted with all the material facts than any witnesses who can now be produced" and, as a result, the court had "no satisfactory assurance that a very different state of facts might not have appeared").

Knight's delay also prejudiced the Bank's position by increasing its financial exposure. Had Knight sued before the Bank lent money to Cutro, it could have avoided the potential for losses by refusing to loan Cutro money until after Knight's claims were resolved. Similarly, had Knight sued before the Bank purchased the property at the sheriff's sale, it might have been able to mitigate its losses by seeking compensation from Cutro's estate or from Enders. Knight's decision to sleep on her rights while the Bank acquired rights to the property also strongly supports the trial court's

decision to apply laches. See *Ford v Loomis*, 33 Mich 121, 122-123 (1876) (holding that application of laches was proper where the plaintiff "stood silently by while the property was being improved, by parties claiming to own it in fee, until it has now become very valuable, and third parties have acquired rights therein"). Given the record evidence that Knight delayed suing for years after the point at which she knew or should have known of her claim and that the Bank's ability to defend against her suit was severely prejudiced by the delay, we cannot conclude that the trial court erred when it dismissed Knight's claim on the basis of laches.

Notwithstanding the evidence that the Bank was prejudiced by her delay in bringing the suit, Knight claims that the Bank could not avail itself of laches because it was plainly on notice that Cutro's title was defective. Specifically, she claims that whenever a person transfers title to himself or herself using a power of attorney, that transfer is facially invalid. Generally, an agent cannot use his or her agency to transfer the principal's property to himself or herself. See *Wilson v White*, 223 Mich 497, 503; 194 NW 593 (1923); see also *McKay v Williams*, 67 Mich 547; 35 NW 159 (1887). Nevertheless, where an agent's transfer is not inconsistent with his or her duty to the principal, the agent may make such a transfer. See *Hutton v Sherrard*, 183 Mich 356, 358-359; 150 NW 135 (1914). If Coe authorized Cutro to transfer the property to herself, then the transfer was valid and Knight would have no right to complain. For that reason, the Bank could have defended against Knight's claim by presenting evidence that Coe had actually authorized Cutro's transfer. But, as a result of Knight's unexplained delay, the Bank no longer has access to the evidence that would prove the validity of the transfer. Therefore, under the circumstances, the fact that the Bank knew, or at the least

should have known, that Cutro transferred the property from her mother to herself using a power of attorney did not preclude the Bank from asserting laches as a defense.

Knight also argues that laches does not generally apply to bar a claim that was brought within the applicable period of limitations and where the plaintiff comes to equity for the protection of a vested legal right. However, this Court has held that laches can apply "even though the period of limitations has not run." *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 456; 761 NW2d 846 (2008); see also *Lothian*, 414 Mich at 175 (characterizing laches as a "cut-off measure, interposed as a defense designed to lay to rest claims which are stale as well as prejudicial to the defendant"). Accordingly, the fact that Knight sued within the applicable period of limitations does not preclude the application of laches to bar her claim. Likewise, Knight did not have a vested right to the property that would render laches inapplicable; in cases where there are vested rights, the plaintiff has no obligation to assert his or her rights as against some third party because the world is on notice of the plaintiff's good title. See *Angeloff v Smith*, 254 Mich 99, 101; 235 NW 823 (1931). Knight never had record title to the 200-acre parcel, and, to the extent that she claimed such a right after her sister's transfer, she had to assert that in a timely fashion, which she did not do.

## III. CONCLUSION

The trial court did not err when it dismissed Knight's claim against the Bank under MCR 2.116(C)(7). Knight delayed bringing her suit to quiet title to the property at issue for years. During that time, the primary witnesses to the events underlying Knight's claim died and it is

reasonable to infer that significant evidence has been lost. Given the degree that Knight's delay prejudiced the Bank's ability to defend, we cannot conclude that the trial court erred when it applied laches to bar Knight's claim. As our Supreme Court explained in a case where the primary witnesses had similarly died:

> [W]e can feel no satisfactory assurance that a very different state of facts might not have appeared, fully establishing the validity and good faith of the proceedings, had this suit been brought, and the testimony taken, while those who best knew the facts were able to speak. Nor can we grant the relief asked without just apprehension of doing injury alike to the rights of the living and the memory of the dead. [*Campau*, 15 Mich at 381.]

Under the facts of this case, it was proper for the trial court to leave the parties where it found them. *Duck*, 263 Mich at 328.[3]

Affirmed. As the prevailing parties, Northpointe Bank and NPB Mortgage, LLC may tax their costs. MCR 7.219(A).

SAWYER, P.J., and MARKEY and M. J. KELLY, JJ., concurred.

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[3] Having concluded that the trial court did not err when it dismissed Knight's claim on the basis of laches, we decline to consider Knight's remaining argument on appeal.

PEOPLE v WAMBAR

Docket No. 304116. Submitted July 18, 2012, at Detroit. Decided March 26, 2013, at 9:05 a.m.

Helmet Wambar pleaded guilty in the Wayne Circuit Court, Linda V. Parker, J., to a charge of unlawful taking of a child. Defendant filed a delayed application for leave to appeal, contending that he could not be convicted of attempting to take the child, his biological child, even though his parental rights to the child had been terminated. The Court of Appeals granted defendant's application

The Court of Appeals *held*:

1. A person may cease to be a parent for certain purposes under the law if the person's status as a parent has been terminated in a judicial proceeding. In light of the termination of defendant's parental rights, the exclusion of defendant as a "natural parent" for purposes of MCL 750.350(2) best gives effect to the Legislature's intent in enacting the statute.

2. Although the Legislature could have added an explicit provision to MCL 750.350(2) explaining that the phrase "natural parent" does not encompass a person whose parental rights have been terminated, in light of the special legal definition of "parent" and the general import of a termination of parental rights, the exemption in MCL 750.350(2) should be read to exclude a person such as defendant from being considered a "natural parent." Defendant did not fit within the definition of "natural parent" in MCL 750.350(2).

Affirmed.

WILDER, J., concurring, joined in the result reached by the majority but wrote separately to offer an additional basis for concluding that defendant is not a "natural parent" under Michigan law. The use of the phrase "natural parent" in MCL 750.350(2) was neither intended to circumvent the meaning of the phrase "natural parent" as that phrase is used in the Child Custody Act, MCL 722.21 *et seq*., nor to undermine the legislative determination that once a court terminates a person's parental rights, there may be no further effort to unite the child with the former parent. Whether a person is a "natural parent" under MCL 750.350(2)

must, under certain circumstances, be determined without regard to whether there is a biological connection with the child. Defendant's conviction should be affirmed.

1. STATUTES — WORDS AND PHRASES — PARENT.

A person may cease to be a "parent" for certain purposes under the law if the person's status as a parent has been terminated in a judicial proceeding.

2. CRIMINAL LAW — KIDNAPPING — BIOLOGICAL PARENTS — WORDS AND PHRASES — NATURAL PARENT.

A person who is the biological father or mother of a child and has had his or her parental rights to the child terminated is not a "natural parent" of the child for purposes of the subsection of the statute prohibiting the kidnapping of a child under the age of 14 that provides that an adoptive or natural parent of the child shall not be charged with and convicted of a violation of the statute (MCL 750.350[2]).

*Bill Schuette*, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training, and Appeals, for the people.

*Adil Haradhvala* for defendant.

Before: METER, P.J., and FITZGERALD and WILDER, JJ.

METER, P.J. We granted defendant's delayed application for leave to appeal his plea-based conviction of attempted unlawful taking of a child, MCL 750.92; MCL 750.350.[1] The trial court sentenced defendant to five years' nonreporting probation and ordered that defen-

[1] Defendant had also been charged with four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13 years old), five counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13 years old), engaging a child in sexually abusive activity, MCL 750.145c(2), and custodial interference, MCL 750.350a. The prosecution dropped the criminal-sexual-conduct and sexually-abusive-activity charges. The trial court dismissed the custodial-interference charge.

dant have no contact with the victim, AW, his biological child. Defendant argues that his conviction must be reversed because he could not be convicted of attempting to take his biological child, even though his parental rights to the child had earlier been terminated.[2] We disagree and affirm.

The parties stipulated to the following factual summary:

> Beginning on Sunday, January 3rd, 2010, at 6896 Penrod, in the City of Detroit, County of Wayne, State of Michigan, the Defendant did assist or aid and abet Ms. La[Q]uanda Wambar [the child's biological mother] in maliciously, forcibly or fraudulently taking or carrying away [AW] . . . [and d]id take or carry away or entice away [AW], then age six, with the intent to detain or conceal [AW] from her legal guardian at the time . . . .
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> And that that happened between the time of January 3rd, 2010, until they were discovered by police on January 5th, 2010, at 15327 Cheyenne, in the City of Detroit, County of Wayne, State of Michigan. And that [defendant] actively assisted [LaQuanda] in helping [LaQuanda] to do that, to detain the child away from that person.[3]

Before entering his plea (during which he expressly preserved for appeal the issue we address today), defendant argued for a dismissal of the attempted-taking count on the basis of MCL 750.350(2). MCL 750.350 states:

> (1) A person shall not maliciously, forcibly, or fraudulently lead, take, carry away, decoy, or entice away, any child under the age of 14 years, with the intent to detain or conceal the child from the child's parent or legal guardian,

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[2] Defendant's rights, as well as the mother's rights, were terminated after an incident during which the young child ingested cocaine.

[3] In connection with the incident, LaQuanda pleaded guilty to a charge of attempted unlawful taking of a child, and it does not appear that she has appealed her conviction.

> or from the person or persons who have adopted the child, or from any other person having the lawful charge of the child. A person who violates this section is guilty of a felony, punishable by imprisonment for life or any term of years.
>
> (2) An adoptive or natural parent of the child shall not be charged with and convicted for a violation of this section.[4]

Defendant argued that MCL 750.350(2) precluded his conviction in the present case because "natural parent" means biological parent and encompasses him. The trial court disagreed, stating, in part:

> [I]t's just inconceivable the [L]egislature would have wanted to allow for an exemption, if you will, of a person, of a parent being charged with kidnapping once the parental rights have been terminated. Don't [sic] seem conceivable that the [L]egislature would have wanted to protect a parent who no longer, really in the eyes of the law, is a parent. For all intents and purposes, they have no right to be a parent. Those rights have been permanently terminated.

In the present appeal, defendant raises the "natural parent" issue once again. Resolution of this issue involves statutory interpretation, and thus our review is de novo. *People v Flick*, 487 Mich 1, 8-9; 790 NW2d 295 (2010).

> The overriding goal of statutory interpretation is to ascertain and give effect to the Legislature's intent. The touchstone of legislative intent is the statute's language. The words of a statute provide the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the overall context in which they are used. An undefined statutory word or phrase must be accorded its plain and ordinary meaning,

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[4] Instead of being charged under MCL 750.350, adoptive or natural parents may be charged under the parental-kidnapping statute, MCL 750.350a.

> unless the undefined word or phrase is a term of art with a unique legal meaning. When we interpret the Michigan Penal Code, we do so according to the fair import of [the] terms, to promote justice and to effect the objects of the law. [*Id*. at 10-11 (citations and quotation marks omitted).]

Defendant claims that this Court should interpret the term "natural" to be a synonym for biological. The legal and ordinary definitions of the word "natural" do imply a physical link. *Random House Webster's College Dictionary* (1997) defines "natural," in relevant part, as being "related by blood rather than by adoption." Similarly, Black's Law Dictionary (9th ed) defines "natural," in part, as "[o]f or relating to birth," as in a "natural child as distinguished from [an] adopted child."[5]

A pertinent question, however, is whether defendant is AW's "parent" for purposes of the statute in question. According to Black's, the term "parent" has a specific meaning in the law. See *Flick*, 487 Mich at 11 (acknowledging that certain terms have a unique legal meaning). Indeed, Black's Law Dictionary (9th ed) defines the term "parent," in part, as "[t]he *lawful* father or mother of someone" (emphasis added). Black's goes on to state:

> In ordinary usage, the term denotes more than responsibility for conception and birth. The term commonly includes (1) either the natural father or the natural mother of a child, (2) either the adoptive father or the adoptive mother of a child, (3) a child's putative blood parent who has expressly acknowledged paternity, and (4) an indi-

[5] However, we acknowledge the point touched on in the concurring opinion—the phrase "natural parent" is not always defined under the law as referring to a parent who biologically produced a child, because of specific rules relating to children born during wedlock. See, generally, *Pecoraro v Rostagno-Wallat*, 291 Mich App 303, 312-314; 805 NW2d 226 (2011).

> vidual or agency whose status as guardian has been established by judicial decree. *In law, parental status based on any criterion may be terminated by judicial decree*. [Emphasis added.]

This explication indicates that a person may cease to be a parent for certain purposes under the law if that person's status as a parent has been terminated in a legal proceeding. Here, defendant's status as a parent was indeed terminated in a legal proceeding.

In light of the termination of defendant's parental rights, the exclusion of defendant as a "natural parent" for purposes of MCL 750.350(2) best "give[s] effect to the Legislature's intent." *Flick*, 487 Mich at 10. The Legislature has authorized the courts to terminate a person's parental rights in limited situations where the child's health or safety is at risk. See MCL 712A.19b(3). Once a court terminates parental rights, all efforts to reunite the child with the former parent are discontinued. MCL 712A.19b(5). It would be anomalous for the Legislature to authorize a court to terminate a person's parental rights but to protect that same person if he or she attempted to take the child away from a person with legal rights to the child.[6]

Other statutes underline the significance of a termination of parental rights. MCL 333.10102(t), dealing with anatomical gifts, explicitly defines the term "parent" as "a parent whose parental rights have not been terminated." In the context of intestate succession, MCL 700.2114(3) states that "[t]he permanent termination of parental rights of a minor child by an order of

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[6] MCL 750.350a allows for a conviction if an adoptive or natural parent takes a child with the intent to keep the child from any other parent or guardian exercising custody or parenting-time rights. However, the potential punishment under MCL 750.350a is much less than under MCL 750.350.

a court of competent jurisdiction . . . ends kinship between the parent whose rights are so terminated and the child for purposes of intestate succession by that parent from or through that child." While it is true that the Legislature could have added an explicit provision to MCL 750.350(2) explaining that the phrase "natural parent" does not encompass a person whose parental rights have been terminated, we nonetheless conclude, in light of the special legal definition of "parent" and in light of the general import of a termination of parental rights, that the exemption in MCL 750.350(2) should be read to exclude a person such as defendant.

Cases from other jurisdictions support this conclusion. In *People v Brown*, 264 AD2d 12, 13-14; 702 NYS2d 739 (2000), the New York Supreme Court, Appellate Division, concluded that a biological mother whose child had been adopted was not a parent of that child for purposes of a potential defense to a kidnapping charge because a domestic-relations statute stated that adopted children should be treated as the child of the adoptive parents. The court stated that "[t]he statute [providing relatives of the person abducted with a defense to a kidnapping charge] is stretched beyond the limits of its intent if we accept the view that a biological parent, with no legal rights or responsibilities with respect to the child, is entitled to the benefit of the affirmative defense." *Id*. at 14. Similarly, in *State v Wilhite*, 160 Ariz 228, 229-231; 772 P2d 582 (Ariz App, 1989), the Arizona Court of Appeals held that the defendant, the biological father of a kidnapped child, was not a "parent" (and thus subject to lesser penalties) within the meaning of a custodial-interference statute because his parental rights had been terminated and the child had been adopted by the defendant's brother.

Defendant cites *People v Fields*, 101 Mich App 287; 300 NW2d 548 (1980), in support of his argument on appeal. *Fields*, however, is largely inapposite because it dealt with a prior version of MCL 750.350 and with a parent whose parental rights had not been terminated. The case does provide some tangential guidance in the present situation, but this guidance does *not* weigh in defendant's favor. The statute at issue in *Fields* read:

> Any person who shall maliciously, forcibly or fraudulently lead, take or carry away, or decoy or entice away, any child under the age of 14 years, with intent to detain or conceal such child from its parent or guardian, or from the person or persons who have lawfully adopted said child or from any other person having the lawful charge of said child, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any term of years. In case such child shall have been adopted by a person or persons other than its parents, in accordance with the statute providing for such adoption, then this section shall apply as well to such taking, carrying, decoying, or enticing away of such child, by its father or mother, as by any other person. [See MCL 750.350 before its amendment by 1983 PA 138.]

The children at issue in *Fields* had been made temporary court wards, and the biological parents took the children from a social worker as she was returning them to their temporary placements. *Fields*, 101 Mich App at 289-290. The prosecution argued that the defendant, the biological mother, could be prosecuted under the statute in question, but the Court of Appeals concluded that she could not, in light of "the specific reference to the conduct of natural parents in the context of *adopted* children . . . ." *Id*. at 290-291 (emphasis added).[7] Significantly, the Court then added the following commentary:

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[7] The Court concluded that the "more general" prohibition of the first sentence of the statute did not apply to the defendant because of her parental status and that any possible prosecution would be under the more specific second sentence. *Id*. The Court then found that prosecution

> If the statute's application should be expanded to cover the taking of children by natural parents in other than the adoption setting, such expansion should reasonably include only those cases where parental rights have been similarly severed.
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> . . . There is a crucial difference between a parent who has temporarily lost custody of a child and one who has permanently lost parental rights. A parent whose rights remain undecided at the time of the taking may not have any right to custody, but we are of the opinion that temporary loss of physical possession of the child is not the proper basis for decision. If application of the statute is to extend beyond parental taking of an adopted child, such taking following *permanent* loss of parental rights or custody is most closely akin to the conduct actually prohibited by the language. [*Id*. at 292.]

Given the outdated statute at issue, *Fields* provides no binding law for use in the present case, but the Court's commentary nonetheless does mesh with the principles we espouse today, in that the Court recognized the special significance of a permanent loss of parental rights.

We conclude that defendant did not fit within the definition of "natural parent" in MCL 750.350(2). Thus, his conviction was proper and the trial court did not erroneously deprive him of presenting a defense.[8]

Affirmed.

FITZGERALD, J., concurred with METER, P.J.

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was not possible under the second sentence in light of the temporary nature of the wardship. *Id*. at 292.

[8] Defendant contends that whether the phrase "natural parent" applied to him should have been a jury question. This contention is meritless. Indeed, the issue in the present case was one of law for the court to decide. See, generally, *People v Gayheart*, 285 Mich App 202, 211; 776 NW2d 330 (2009). Finally, we note that nothing in this opinion should be read as impacting the Michigan Supreme Court's decision in *In re Beck*, 488 Mich 6, 8, 16; 793 NW2d 562 (2010), that parental rights and parental obligations are separate and that a child-support obligation may remain in effect even after parental rights are terminated.

WILDER, J. (*concurring*). I join in the result but write separately to offer an additional basis for concluding that defendant is not a "natural parent" under Michigan law.

Pursuant to MCL 722.1(b), " 'Parents' means natural parents, if married prior or subsequent to the minor's birth; adopting parents, if the minor has been legally adopted; or the mother, if the minor is illegitimate." MCL 722.22(h) defines "parent" as "the natural or adoptive parent of a child." In *Pecoraro v Rostagno-Wallat*, 291 Mich App 303, 313-314; 805 NW2d 226 (2011), this Court found that the plaintiff, regardless of his assertion that he was the biological father of the minor child, had no standing to establish paternity under the Michigan Paternity Act, MCL 722.11 *et seq*., and thus could not be the parent of the minor child as that phrase is used in the Paternity Act because the mother of the child was married to another man when the child was conceived. In support of this conclusion, this Court cited *Girard v Wagenmaker*, 437 Mich 231, 251; 470 NW2d 372 (1991), in which our Supreme Court concluded that "a putative father of a child born to a woman married to another man . . . could not obtain a determination that he was the natural or biological father of the child under the Child Custody Act [MCL 722.21 *et seq*.]." This Court further noted in *Pecoraro* that "[t]he phrase 'natural parent' was used by the Legislature [in the Child Custody Act] to distinguish between adoptive parents and non-adoptive parents" but was not intended to circumvent the Paternity Act, which under certain circumstances will not recognize a putative father claiming to be the biological father of a minor child as that child's "natural parent." *Pecoraro*, 291 Mich App at 314.

As applied to the facts in this case, I would conclude, similar to the conclusion reached by the *Pecoraro* Court,

that the use of the phrase "natural parent" in MCL 750.350(2) was neither intended to circumvent the meaning of the phrase "natural parent" as that phrase is used in the Child Custody Act nor undermine the Legislative determination that once a court terminates a person's parental rights, there may be no further efforts to reunite the child with the former parent. In other words, whether a person is a natural parent under MCL 750.350(2) must, under certain circumstances, be determined without regard to whether there is a biological connection with the minor child.

Thus, together with these additional reasons stated above, I agree with the majority that defendant's conviction should be affirmed.

ZAHER v MIOTKE

Docket No. 307394. Submitted March 5, 2013, at Detroit. Decided March 28, 2013, at 9:00 a.m.

Raji J. Zaher brought an action in the Genesee Circuit Court, Judith A. Fullerton, J., against Michael J. Miotke, seeking a preliminary injunction to return a joint driveway to the condition it had been in before Miotke made changes and a permanent injunction to enforce a joint-driveway easement. Miotke filed a counterclaim, seeking demolition of a garage constructed by Zaher, and a third-party action against Gregory L. and Linda M. Hoover and others. The actions arose from a dispute involving an easement for a joint driveway servicing adjacent real property owned by Zaher and Miotke. The property involved, lots 2 and 3 in a condominium development, was originally purchased by Gregory Hoover (Hoover) in his name alone. Hoover was married to Linda Hoover (Linda) at the time and Linda therefore acquired a dower interest in the property, although that interest would not vest unless or until Hoover died before Linda. Hoover hired Zaher to construct a house for him on lot 2 in exchange for transferring ownership of lot 3 to Zaher. Zaher constructed houses on both lots and, during the process, determined that a joint driveway easement over lot 2 was necessary for him to be able to use his garages on lot 3. Hoover, in his name alone, and without Linda's participation, signed a written joint-driveway easement, which was not recorded. After Zaher constructed the driveway, Hoover sold lot 2 and the house thereon to Miotke. Hoover and Linda both signed the warranty deed transferring Hoover's interest in the property to Miotke. Hoover and Linda then signed a warranty deed transferring Hoover's interest in lot 3 to Zaher. Both deeds provided that the property interest conveyed was subject to easements of record and both were recorded. Miotke thereafter removed some of the brick pavers from the driveway just inside his property's boundary line and planted rose bushes in their place. The result was that Zaher thereafter only had access to a 10-foot-wide portion of what had been a 30-foot wide joint driveway. The court granted Zaher's motion for a preliminary injunction but denied, in part, the parties' motions and cross-motions for summary disposition, holding that there remained questions of fact regarding, among other

things, whether Miotke was aware of the joint driveway use when the sale occurred. The court also granted partial summary disposition in favor of Zaher and denied Miotke's motion for summary disposition when it agreed with Zaher that the easement was not void *ab initio*. The court held that Linda had since waived her dower interest in lot 2 by joining Hoover's transfer of his fee interest to Miotke and thereby had cured any deficiency in the easement conveyance. The Court of Appeals granted Miotke's interlocutory application for leave to appeal in an unpublished order, entered July 27, 2012 (Docket No. 307394).

The Court of Appeals held:

An inchoate dower interest is an encumbrance on a husband's property that can be valued. Therefore, a purchaser who takes land subject to such an encumbrance can be recompensed without invalidating the conveyance. Although there may be notice issues nullifying Zaher's claimed easement, the transfer was not void under the statute of frauds. The trial court's grant of partial summary disposition in favor of Zaher is affirmed.

1. An easement is an interest in land that is subject to the statute of frauds. The statute of frauds provides that in order to transfer an interest in property, all parties possessing an interest in the subject property must sign the document. The granted easement clearly violated the statute of frauds because Linda did not sign the joint-easement document granting Zaher an easement over lot 2.

2. There is no precedent demanding that the Court of Appeals hold that an easement is invalid when the holder of only an inchoate dower interest in the property has failed to sign a contract conveying the easement.

3. A wife's dower interest is different from an ownership interest (a) because an inchoate dower interest might never ripen into a consummate possessory interest, (b) because, even if a wife elects to take her dower interest, a particular piece of her late husband's property might not be affected, and (c) the wife's interest has a finite term because she has only a life estate in her dower properties.

4. Only a wife may divest herself of her dower interest, her husband may not bargain it away.

5. Although MCL 566.108 provides that a contract that violates the statute of frauds "shall be void," the vast majority of the precedent that the Court of Appeals is bound to follow concludes that such a contract is not void.

6. An inchoate dower interest is merely a potential future limited possessory interest in land because if a wife survives her husband and has not waived her dower interest, she will become entitled to a one-third interest in the property. This is not an ownership interest that prevents a current transfer to another. The transfer of a property interest may stand despite a husband's failure to secure the release of his wife's inchoate dower rights. No precedent supports a holding that Zaher's easement across lot 2 was invalid from the outset.

7. A wife may bar her dower interest through a later transfer, thereby curing a defect in an earlier conveyance.

8. Because Linda extinguished her dower rights to lot 2 by joining Hoover's conveyance to Miotke, those rights no longer impair lot 2 or compete with Zaher's easement. Although Miotke might successfully challenge the easement on notice grounds, Linda's extinct dower rights are not a defense available to Miotke

Affirmed.

1. EASEMENTS — STATUTE OF FRAUDS.

An easement is an interest in land that is subject to the statute of frauds; the statute of frauds requires all parties possessing an interest in the subject property to sign a document that transfers an interest in the property (MCL 566.106; MCL 566.108).

2. EASEMENTS — DOWER AND CURTESY — INCHOATE DOWER INTERESTS.

An easement need not be declared invalid when the holder of only an inchoate dower interest in the property has failed to sign a contract conveying the easement because an inchoate dower interest is an encumbrance on a husband's property that can be valued and, therefore, a purchaser who takes land subject to such an encumbrance can be recompensed without invalidating the conveyance.

3. DOWER AND CURTESY — INCHOATE DOWER INTERESTS — WAIVER OF DOWER INTERESTS.

A wife's dower interest is inchoate while her husband is alive and does not vest or become consummate until her husband's death; only a wife may divest herself of her dower interest, her husband may not bargain it away (MCL 558.1).

4. DOWER AND CURTESY — INCHOATE DOWER INTERESTS.

An inchoate dower interest is merely a potential future interest under which a wife will become entitled to a one-third interest of her late husband's real property if the wife survives her husband

and has not waived her dower interest; dower confers on a wife a life estate to one-third of the husband's real property after his death (MCL 558.1).

5. DOWER AND CURTESY — BARRING DOWER INTERESTS.

A wife may bar her dower interest through a later transfer that cures a defect in an earlier conveyance (MCL 558.1).

*Rizik & Rizik* (by *George F. Rizik, II*) for plaintiff.

*Jason M. Ministrelli* for defendant.

Before: GLEICHER, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM. The question presented in this case is whether an easement is void *ab initio* or merely subject to a lien-type interest when the male owner of a servient estate violates the statute of frauds by granting an easement without securing his wife's waiver of her then inchoate dower interest. Consistent with long-standing precedent of the Michigan Supreme Court, an inchoate dower interest is an encumbrance on a husband's property that can be valued. Therefore, a purchaser who takes land subject to such an encumbrance can be recompensed without invalidating the conveyance.

In this case, defendant is the successor in interest to a husband who, without his wife's participation, granted an easement across his property in plaintiff's favor. The husband's wife has since waived her dower interest in the property and there is nothing left to encumber the easement transfer. Although there may be notice issues nullifying plaintiff's claimed easement, the transfer is not void under the statute of frauds. We affirm the circuit court's grant of partial summary disposition in plaintiff's favor.

I. BACKGROUND

In 2003, Gregory Hoover (Hoover), although married to Linda Hoover (Linda), purchased in his name alone contiguous lots 2 and 3 in the North Bay Shores site condominium development in Fenton. When Hoover bought the lots, Linda acquired a dower interest in the property, although that interest would not vest unless or until Hoover died before Linda. MCL 558.1. Hoover hired plaintiff, Raji Zaher, to construct a house for him on lot 2. In the construction contract, signed by Hoover without his wife, Hoover agreed to transfer ownership of lot 3 to Zaher as payment. Zaher built a home for Hoover on lot 2 and simultaneously constructed his own home on lot 3.

During the construction process, Zaher concluded that he would not have sufficient room to maneuver into his sideways-facing garages if his driveway occupied only his own lot. Accordingly, he sought and obtained a "joint driveway easement" over lot 2. Hoover signed a written easement on October 27, 2007, in his name alone and without his wife's participation. Neither Zaher nor Hoover recorded the easement. Thereafter, Zaher constructed a single, 30-foot-wide driveway straddling the boundary line between the lots. Twenty feet of the driveway's width was on lot 2, which was then owned by Hoover. The driveway was paved with a uniform brick pattern and shared a single entry ramp from the road.

On April 26, 2010, Hoover sold lot 2 along with the newly constructed home to defendant, Michael Miotke. Hoover and his wife, Linda, signed the warranty deed transferring Hoover's interest in the property. On August 30, 2010, Hoover and Linda signed a warranty deed transferring Hoover's interest in lot 3 to Zaher.

Both deeds were recorded. Both also provided that the property interest conveyed was subject to "easements of record."

In May 2011, Miotke removed a line of brick pavers just inside his property's boundary line and planted a row of rosebushes. Miotke claimed that his decision to divide the driveway coincided with his decision to have other masonry work performed on the property. Miotke also had his front porch repoured and installed a new pattern of brick pavers on the porch and "his" 20-foot portion of the driveway. Zaher, who was out of town at the time, returned to discover that he could no longer park his vehicles in his garages as he only had access to a 10-foot-wide portion of the driveway.

The current lawsuit ensued. Zaher sought a preliminary injunction to return the driveway to the condition it had been in before Miotke changed it and also a permanent injunction to enforce the joint-driveway easement. Miotke filed a counterclaim seeking demolition of Zaher's garages as they were constructed outside the "building envelope" allowed by the condominium development's master plan. Miotke also filed a third-party action against the Hoovers and their real estate broker for their alleged failure to advise him of the joint-driveway easement before closing the sale.

The circuit court granted Zaher's motion for a preliminary injunction and Miotke does not challenge that decision. The court thereafter denied the parties' motions and cross-motions for summary disposition, determining that there remained questions of fact regarding, among other issues, Miotke's awareness of the joint driveway use when the sale occurred. The court did, however, grant partial summary disposition in Zaher's favor on one issue. The court ruled, contrary to Miotke's protestations, that the easement over lot 2 was not

void or voidable from its inception even though Linda was not a party to the document and therefore did not release her inchoate dower interest in the encumbered lot 2.

Miotke continues to contend that the joint-driveway easement was void from its inception. Under the statute of frauds, MCL 566.106 and MCL 566.108, an easement is the transfer of a property interest and must be made in writing and signed by everyone with an interest in the property. Linda, although not a coowner of lot 2, obtained an inchoate dower interest in the property when her husband purchased it. And, according to Miotke, Linda did not waive her inchoate dower interest by joining the transfer of the easement to Zaher, rendering that transfer invalid.

Zaher counters that Linda's failure to sign the easement did not render the easement void; rather, Linda's failure to waive her inchoate dower interest at the time the easement was created "merely cloud[ed] the title to that grant." If Hoover died without Linda having waived her dower interest, then the property subject to the easement also would have become subject to Linda's realized dower interest. However, according to Zaher, Linda did waive her inchoate dower interest in lot 2 when she joined Hoover's transfer to Miotke through the warranty deed and no longer has an interest to claim in the property.

The circuit court agreed with Zaher that the easement was not void *ab initio*. The court concluded that the situation had to be "evaluated or reviewed" by "looking at it now, not then." The court held that Linda had since waived her dower interest in lot 2 by joining her husband's transfer of his fee interest to Miotke and thereby "cured" any deficiency in the easement conveyance. The court therefore granted partial summary

disposition in Zaher's favor and denied Miotke's motion for summary disposition on this limited issue.[1]

## II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 243; 704 NW2d 117 (2005). A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the complaint on the basis of the pleadings alone to determine if the opposing party has stated a claim for which relief can be granted." *Begin v Mich Bell Tel Co*, 284 Mich App 581, 591; 773 NW2d 271 (2009). We must accept all well-pleaded allegations as true and construe them in the light most favorable to the nonmoving party. *Id.* The motion should be granted only if no factual development could possibly justify recovery. *Id.*

A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the

[1] Despite that several issues remained pending in the circuit court, this Court granted Miotke's interlocutory application for leave to appeal. *Zaher v Miotke*, unpublished order of the Court of Appeals, entered July 27, 2012 (Docket No. 307394).

benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

We review de novo underlying issues regarding the interpretation and applicability of a statute, such as the statute of frauds relied upon by the parties in this case. *Adams Outdoor Advertising, Inc v City of Holland*, 463 Mich 675, 681; 625 NW2d 377 (2001).

## III. ANALYSIS

"An easement is an interest in land that is subject to the statute of frauds." *Forge v Smith*, 458 Mich 198, 205; 580 NW2d 876 (1998). The statute of frauds is codified at MCL 566.106, which provides:

> No estate or interest in lands . . . shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

MCL 566.108 provides similar requirements for contracts covering the transfer of a property interest:

> Every contract . . . for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized in writing . . . .[2]

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[2] Zaher incorrectly posits that MCL 566.108 is inapplicable because "[t]here was no contract to grant an easement in the future," only a document representing a contemporaneous conveyance. Zaher has cited no support for this proposition. Moreover, nothing in the language of MCL 566.108 suggests that a "contract . . . for the sale of any lands, or any interest in lands" cannot be entered into at the same time as the conveyance.

The easement granted by Hoover over his property, lot 2, for the benefit of Zaher and his property, lot 3, was reduced to a written document. Under the statute of frauds, however, to transfer an interest in property, all parties possessing an interest in the subject property must sign the document. *Forge*, 458 Mich at 206 ("[a]ll owners of jointly held property must sign a contract conveying an interest in the property," e.g., an easement in *Forge*); *Slater Mgt Corp v Nash*, 212 Mich App 30, 32; 536 NW2d 843 (1995) (holding that the statute of frauds applies to a seller's wife holding only a dower interest in the property so the wife must sign the purchase agreement as well as the seller husband). It is undisputed that Hoover's wife, Linda, did not sign the document granting Zaher an easement over lot 2. Accordingly, the granted easement clearly violated the statute of frauds. The question then becomes one of remedy: should the easement be nullified as void from its creation, or is Linda's inchoate dower interest a cloud on the property's title that evaporated when Linda joined the warranty deed transferring the property and waived her dower rights?

In *Forge*, 458 Mich at 206, the Supreme Court held: "All owners of jointly held property must sign a contract conveying an interest in the property; the absence of a signature by a co-owner renders the contract void." Like the current case, *Forge* involved an action to enforce an easement. *Id.* at 201-202. However, Linda was not a coowner of lot 2; the property was held by Hoover alone, not jointly with his wife. There is no precedent demanding this Court to hold an easement invalid when the holder of only an inchoate dower

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We further note that since its inception in the statutes of 1846, this provision has stated that transfers not conducted consistently with the statute "shall be void." 1846 RS, ch 80, § 8.

interest in the property has failed to sign a contract conveying the easement to the property.

A. THE NATURE OF DOWER INTERESTS

MCL 558.1 governs a wife's dower interest as follows: "The widow of every deceased person, shall be entitled to dower, or the use during her natural life, of 1/3 part of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage, unless she is lawfully barred thereof." The statute, first enacted in 1846, codified the common-law rule of dower. *Redman v Shaw*, 300 Mich 314, 316; 1 NW2d 555 (1942). While a woman's husband is alive, she has only an inchoate dower interest; the right does not vest or become consummate until her husband's death. *Oades v Std S & L Ass'n*, 257 Mich 469, 473; 241 NW 262 (1932); *Cummings v Schreur*, 236 Mich 628, 630; 211 NW 25 (1926). Once she becomes a widow, a woman does not take a fee interest in one-third of her late husband's real property; she is entitled only to the use of one-third of the property. The widow's use extends only for the period comprising the remainder of her natural life. Basically, dower confers on a wife a life estate to one-third of her husband's real property after his death. *Stearns v Perrin*, 130 Mich 456, 459; 90 NW 297 (1902). See also 25 Am Jur 2d, Dower & Curtesy, § 1, pp 60-61; 28 CJS, Dower & Curtesy, §§ 1-5, pp 105-109.

A wife's dower interest is different from an ownership interest in several ways. First, an inchoate dower interest might never ripen into a consummate possessory interest. If a wife dies before her husband, her dower rights die with her. *Vanderlinde v Bankers Trust Co of Muskegon*, 270 Mich 599, 606; 259 NW 337 (1935). A wife's dower rights are barred if she and her husband

divorce before his death. See MCL 552.101(1) (requiring the court to include in a divorce judgment "a provision in lieu of the dower" to bar the wife's future dower claims). A husband might bequeath an inheritance to his wife in his will and the wife could elect to accept that inheritance in lieu of dower. See MCL 700.2202 (1)(a) and (b), (2)(a) (the surviving widow of an intestate decedent may elect to take her intestate share or her dower right and the surviving spouse of a testate decedent may elect to "abide by the terms of the will," take her dower right, or take a modified intestate share); see also *Vanderlinde*, 270 Mich at 605.

Second, even if a wife elects to take her dower interest, a particular piece of her late husband's property might not be affected. A wife has an interest in only one-third of her husband's property. She must file an action or petition the court to assign property to satisfy her dower interest. The court might assign the wife a one-third interest in each of her late husband's properties or it might grant her the use of a selected one-third of the properties. See, e.g., *Walker v Kelly*, 91 Mich 212, 217-218; 51 NW 934 (1892) (concluding that a widow's dower interest could be satisfied monetarily rather than by possession where the subject property was not the homestead of the widow's late husband at the time of his death).

Third, because a wife possesses only a life estate in her dower properties, her interest has a finite term. The property will not forever be subject to her claims and this cloud on the property's title will eventually and naturally be cleared.

B. EFFECT OF A WIFE'S FAILURE TO WAIVE HER DOWER INTEREST

Only a wife may divest herself of her dower interest; her husband "may not bargain [it] away . . . ." *Slater*,

212 Mich App at 32; *M & D Robinson Co v Dunitz*, 12 Mich App 5, 12; 162 NW2d 318 (1968). See also *Buchoz v Walker*, 19 Mich 224, 228 (1869). The language of MCL 566.108 provides that a contract that violates the statute of frauds "shall be void . . . ." And certain courts have held a contract void when a husband conveys away a property interest without securing his wife's waiver of her dower interest. However, the vast majority of precedent concludes that such a contract is not void and we are bound to follow those decisions.

28 CJS, Dower & Curtesy, § 55, p 145 provides:

> Inchoate dower is an *encumbrance* on the husband's estate. Although it has also been held to be in the nature of a lien upon the husband's land, it is not, at least not in the ordinary sense, a lien, since the estate or interest is contingent and the amount is uncertain and variable. [Emphasis added.]

A wife's inchoate dower interest can be valued to cure any improper transfer made without the wife's permission:

> [I]t is generally held that the present cash value of the inchoate right of dower is capable of computation, a common formula being to ascertain the present value of an annuity for the wife's life, equal to interest in a third of the proceeds of the estate to which her contingent right attaches, and then deduct the value of a similar annuity depending upon the joint lives of herself and her husband. Factors to be considered in determining the value include the relative ages, life expectancies, constitutions, and habits of the husband and wife[.] [28 CJS, Dower & Curtesy, § 59, p 147.]

In *Slater*, 212 Mich App at 32, this Court acknowledged that "[a] husband may not bargain away his wife's dower interest" and therefore a wife must sign any contract transferring her husband's interest in his sole property. *Slater* held that a purchase agreement

was "ineffective to convey marketable title" absent the seller's wife's signature. *Id.* at 33. Accordingly, the purchaser could take title to the property, but that interest would be subject to the seller's wife's inchoate dower interest and, upon the seller's death, his wife would become entitled to a one-third interest in the property. Thus, the purchase agreement was not void, but could transfer only a clouded title.

*Slater* held that *Berg-Powell Steel Co v Hartman Group*, 89 Mich App 423; 280 NW2d 557 (1979), controlled its decision. In *Berg*, the purchaser sought to back out of a purchase agreement, in part, because the seller failed to secure his wife's signature on the contract. This Court concluded that the purchase agreement was "void" and that "no valid contract was ever created" because the seller's wife had not waived her dower interest by signing the contract. *Id.* at 427-428, citing *Fields v Korn*, 366 Mich 108; 113 NW2d 860 (1962). In a manner inconsistent with its later decision in *Slater*, the *Berg* Court held that the contract was nullified, not that the purchaser took the title clouded by the seller's wife's dower interest.

*Berg* comports with Supreme Court decisions holding that a contract to transfer a fee interest in land is "void" absent signatures from all coowners of the property. See *Forge*, 458 Mich at 206 ("All owners of jointly held property must sign a contract conveying an interest in the property; the absence of a signature by a co-owner renders the contract void."); *Fields*, 366 Mich at 109-110 ("It is simple assumpsit to recover money paid on a contract which the applicable section of the statute of frauds says 'shall be void' [, MCL 566.108,] for want of required signature of the parties to be charged. . . . That word 'void' is the mandate of the statute. It means the ultimate of legal nullity.").

However, an inchoate dower interest is merely a potential future interest. If a wife survives her husband and has not waived her dower interest, she will become entitled to a one-third interest in the property. This is not an ownership interest that prevents a current transfer to another. As noted, it is possible that the wife's interest will never become consummate and the purchaser's rights will never be affected. Property law is equitable at its core and voiding a contract because of a murky potential interest can be unjust. In a manner consistent with this idea, our Supreme Court has held in many cases that the courts have the equitable power to enforce a conveyance even absent the participation of the seller's wife and have the power to value a dower interest's impact on the property.

In *Rhoades v Davis*, 51 Mich 306, 309; 16 NW 659 (1883), the Supreme Court noted that an inchoate dower right is not an "estate" but "it is a right concerning land, and one which possesses value." That value could be reduced to "a money value, and may be the object of sale and release." *Id.* at 310.

In *Walker*, 91 Mich 212, the plaintiff sued for specific performance of an oral agreement for the transfer of property owned by the defendant, her father.[3] She claimed that her father had promised her a deed to the property, while her father claimed that she was to be a tenant from year to year. *Id.* at 213-215. The defendant argued "that the contract [was] not enforceable, because [his] wife cannot be compelled to release her

[3] Although the claim was predicated on an oral agreement, the statute of frauds was not an issue, possibly because of the doctrine of partial performance. The plaintiff and her husband had sold their own property and turned the proceeds over to the defendant, who used the proceeds to buy another property. The defendant and his wife then moved from the disputed farmland to the new property and the plaintiff and her husband moved to the disputed farmland. *Walker*, 91 Mich at 213.

dower." *Id*. at 217. The Court disagreed, holding that while the defendant's wife "cannot be compelled to release her dower, there is no reason why [the plaintiff] may not have a decree for specific performance so far as defendant Kelly is concerned, and for compensation as to the dower interest of his wife." *Id.* at 217-218 (citation omitted).

In *Solomon v Shewitz*, 185 Mich 620; 152 NW 196 (1915), a man named Pierson entered into an agreement to sell property to the defendant within 30 days. Pierson's wife was purportedly a party to that agreement, but she did not sign it. *Id.* at 622-623. Pierson and his wife then sold the property to the plaintiff despite the earlier contract with the defendant. *Id.* at 623-624. The plaintiff sued the defendant to quiet title and the defendant sued the Piersons for specific performance. *Id.* at 624-626. The trial court ruled in the plaintiff's favor and the Supreme Court reversed. It held that Pierson's agreement with the defendant was a valid executory land contract, not an option, and that the plaintiff had notice of the contract. *Id.* at 629-630. The Court noted that Pierson's wife had an inchoate dower interest in the property at the time Pierson agreed to sell it to the defendant and that, because she was not a party to the land contract, she "cannot be compelled to release her dower in the land" and "is not a proper party to a bill by the purchaser for specific performance." *Id.* at 630-631. The Court took note of *Walker*, in which the plaintiff had been granted "specific performance, subject to the dower rights . . . where the wife was not a party to the contract," but also noted that specific performance "is not a matter of right" but a matter within the trial court's discretion. *Id.* at 631. It held, under the circumstances of the case, the defendant was not entitled to specific performance with an

abatement for the value of Mrs. Pierson's dower interest but was entitled to sue for damages. *Id.* at 631-632.

In *Gluc v Klein*, 226 Mich 175, 176; 197 NW 691 (1924), the defendant entered into a contract to sell certain lands to the plaintiffs. The defendant did not secure his wife's signature on the contract because she was residing in a psychiatric asylum in another state. The plaintiffs sought specific performance of the defendant's promise to convey title free and clear by warranty deed. *Id.* The Court held that "a perfect title to lands owned by" a man cannot be conveyed without his wife's barring her inchoate dower right. *Id.* at 177. The Court did not find the purchase contract void, simply that it could not be enforced to convey clear title.

In *Tandy v Knox*, 313 Mich 147; 20 NW2d 844 (1945), the defendant owned certain property that he agreed to sell to the plaintiff. The defendant's wife was not a party to the agreement. *Id.* at 149-151. The plaintiff took possession of the property and paid the defendant a substantial portion of the purchase price. *Id.* at 151. The agreement called for a land contract to be executed, but that was never effectuated because a dispute arose regarding how much of the property was covered by the agreement. *Id.* at 151-152. The plaintiff sued for specific performance. The trial court determined which part of the property was subject to the agreement and granted the plaintiff the option of specific performance or an accounting. The plaintiff elected specific performance and was granted an abatement of the purchase price equal to the value assigned to the defendant's wife's dower interest. *Id.* at 152-153. The Supreme Court modified and affirmed the decree of the trial court. *Id.* at 158. Regarding the dower issue, the Court stated:

> Because of the refusal of Mrs. Knox to join with her husband in the execution of a land contract, such contract

> must be made subject to her inchoate right of dower. Recognizing the situation in this regard, the trial court held that plaintiff, if he elected to accept specific performance in lieu of an accounting, was entitled to an abatement of the purchase price in an amount equal to the present value of the inchoate dower interest, such value being fixed at the sum of $1,000. [*Id.* at 156.]

These cases all stand for the proposition that the transfer of a property interest may stand despite a husband's failure to secure the release of his wife's inchoate dower rights. There is no support therefore for a holding that Zaher's easement across lot 2 was invalid from the outset.

Further, this Court has held that a wife may bar her dower interest through a later transfer, thereby curing a defect in an earlier conveyance. In *M & D Robinson Co*, 12 Mich App at 7-8, the defendant owned a one-half interest in certain property that he agreed to sell to the plaintiff on land contract. The defendant was married but his wife did not join in the purchase agreement. *Id.* at 9-10. After the execution of the purchase agreement but before execution of a land contract, the defendant and his cotenant on the property became indebted to Lawyers Title Insurance Corporation. *Id.* at 8. In partial payment of the debt, the defendant assigned Lawyers Title his interest in the land contract that was to be executed. The defendant's wife participated in the Lawyers Title agreement and consented "to join with her husband in the execution of any and all instruments called for by" the assignment. *Id.* at 8-9.

Consistently with the previously discussed precedents, this Court agreed with the trial court that, even without the Lawyers Title contract, the plaintiff would have been entitled to specific performance of the agreement to execute a land contract "with damages for the cloud on title represented by the inchoate dower rights"

of the defendant's wife. *Id.* at 9-10, 12. This Court also agreed with the trial court's order to the defendant's wife to execute a land contract and thereby waive her dower rights relative to the land contract as she had promised to do in her consent to the Lawyers Title agreement. *Id.* at 12-13.

### C. APPLICATION TO THE CURRENT CASE

Applied to the facts now before this Court, the law dictates, and equity suggests, that Miotke cannot avoid Zaher's easement simply because Linda did not join Hoover's transfer of that interest. If Hoover still owned lot 2 and blocked Zaher's use of the joint driveway, Zaher could successfully file suit to enforce the easement. Hoover created the problem by failing to secure Linda's written consent at the time of the conveyance. To the extent that the easement may have reduced the value of lot 2, Hoover's estate could be required to recompense Linda in some way for the monetary effect on her dower interest, but only if Hoover predeceased Linda. Ultimately, however, the inchoate dower rights would not nullify the easement. Linda's dower rights are an encumbrance on the property separate from the encumbrance from the easement. The two are not directly contrary and can coexist.

But Hoover did transfer his ownership interest in lot 2 to Miotke with Linda's approval. Linda can no longer claim that the value of her dower interest was somehow affected by Zaher's easement; she no longer has a dower interest. Because Linda extinguished her dower rights to lot 2 by joining Hoover's conveyance to Miotke, those rights no longer impair lot 2 or sit in competition with Zaher's easement. Miotke might successfully challenge the easement on notice grounds, but Linda's extinct dower rights are not a defense available to him.

In summary, an inchoate dower interest is merely a potential future limited possessory interest in land. The interest can be valued and recompensed so that an improper transfer of a property interest without a wife's waiver of her inchoate dower interest can be enforced. Although Hoover's grant of an easement to Zaher violated the statute of frauds because Linda did not join it, the transfer was not void. In any event, Linda subsequently waived her dower interest when Hoover sold the property. Linda's former dower interest is not a defense available to Miotke in Zaher's action to enforce his claimed easement.

Affirmed.

GLEICHER, P.J., and SAWYER and FORT HOOD, JJ., concurred.

*In re* CARROLL (ON REMAND)

Docket No. 292649. Submitted December 27, 2012, at Lansing. Decided April 2, 2013, at 9:00 a.m. Vacated and remanded for reconsideration, 493 Mich 899.

Alan A. May, conservator of the estate of Edward Carroll, a protected person, petitioned the Macomb County Probate Court to order Auto Club Insurance Association to pay his fee of $6,816.70 for serving as conservator for Auto Club's insured, Carroll, who had been injured in an automobile accident. Auto Club opposed the petition, arguing that the amount sought was not related to Carroll's care, recovery, or rehabilitation and, therefore, it was not required by MCL 500.3107(1)(a) of the no-fault act to pay petitioner's fee. The probate court, Pamela G. O'Sullivan, J., ordered Auto Club to pay $99 of the amount sought and held that Carroll's estate was liable for the remainder. May appealed. The Court of Appeals reversed and remanded the matter to the probate court, holding that May's entire fee was related to Carroll's care under MCL 500.3107(1)(a). *In re Carroll*, 292 Mich App 395 (2011). The Supreme Court, in lieu of granting Auto Club's application for leave to appeal, vacated the judgment of the Court of Appeals and remanded the matter to the Court of Appeals for reconsideration in light of *Johnson v Recca*, 492 Mich 169 (2012), and *Douglas v Allstate Ins Co*, 492 Mich 241 (2012). *In re Carroll*, 493 Mich 899 (2012).

On remand, the Court of Appeals *held*:

A conservator's fees do not necessarily constitute fees for an injured person's care, recovery, or rehabilitation under MCL 500.3107(1)(a), even when the injured person would not have needed the conservator's services were it not for his or her injuries. The conservator's fees will be compensable under MCL 500.3107(1)(a) only to the extent that the conservator's services were directly related to the injured person's care, recovery, or rehabilitation. The trial court did not err when it determined that Auto Club only had to compensate May for those services May performed as Carroll's conservator that did not amount to replacement services under MCL 500.3107(1)(c). Because May did not

challenge the probate court's findings in this regard, the determination of the probate court is affirmed.

1. A product, service, or accommodation will not be for an injured person's "care," as that term is used in MCL 500.3107(1)(a), unless the need for the product, service, or accommodation was necessitated by the injured person's injuries. Even when a particular service is necessary because of the injured person's injuries, that service will not constitute an allowable expense if the service was an ordinary service required both before and after the injury, but after the injury can no longer be provided by the injured person himself or herself. In such cases, the service is a replacement service subject to the provisions of MCL 500.3107(1)(c) and cannot serve as a basis for recovery under MCL 500.3135(3)(c).

2. Although services for an insured's care need not restore the person to his or her preinjury state, the services must be related to the insured's injuries to be considered allowable expenses under MCL 500.3107(1)(a).

3. The no-fault act does not limit who may perform what is otherwise an allowable expense under MCL 500.3107(1)(a). The provisions of MCL 500.3107(1)(a) can apply to services performed by a family member. However, services provided by a family member must be carefully distinguished from the types of services that constitute a replacement service under MCL 500.3107(1)(c). Allowable expenses under MCL 500.3107(1)(a) cannot be for ordinary and necessary services because ordinary and necessary services are not for an injured person's care, recovery, or rehabilitation.

4. Several criteria must be established before a particular product, service, or accommodation "for an injured person's care, recovery, or rehabilitation" will be compensable as an allowable expense under MCL 500.3107(1)(a). The claimed benefits must first be causally connected to the accidental bodily injury arising out of an automobile accident and the injury itself must arise from the ownership, operation, maintenance, or use of a motor vehicle.

5. Carroll suffered an injury in an automobile accident that prevented him from handling his own estate. May established the requisite causal connections between the need for his services and Carroll's injuries. Some of May's services constituted replacement services under MCL 500.3107(1)(c) and were, accordingly, not compensable under MCL 500.3107(1)(a). Some of May's services were not replacement services and were otherwise necessary for Carroll's care within the meaning of MCL 500.3107(1)(a). Carroll's need for ordinary household management is not specifically related to his injuries but he does have additional estate-management needs as a result of

his injury, needs that go far beyond those that he required before he was injured. Many of Carroll's financial-management needs are extraordinary and peculiar to his status as an injured person. Because those needs are beyond those that ordinarily would be performed by a member of the household, they are compensable under MCL 500.3107(1)(a) as a service provided for his care, recovery, or rehabilitation. May failed to identify any error warranting relief because he did not challenge the probate court's findings concerning the specific services that were compensable and the amount due for those services.

Affirmed.

1. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — CONSERVATOR'S FEES.

A conservator's fees do not necessarily constitute fees for the care, recovery, or rehabilitation of a person injured in an automobile accident even when the injured person would not have needed the conservator's services were it not for his or her injuries; a conservator's fees are compensable under MCL 500.3107(1)(a) only to the extent that the conservator's services were directly related to the injured person's care, recovery, or rehabilitation.

2. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — ALLOWABLE EXPENSES.

The Legislature, by requiring no-fault insurers to compensate injured persons for the expenses associated with products, services, and accommodations that were reasonably necessary for the injured person's care, recovery, or rehabilitation, provided that allowable expenses included expenses reasonably necessary for the care of the injured person; the Legislature did not limit allowable expenses to those expenses necessary to care for the injured person's injury (MCL 500.3107[1][a]).

3. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — ALLOWABLE EXPENSES.

When a product, service, or accommodation would not have been necessary to provide to a person but for the injuries the person sustained in an automobile accident, the product, service, or accommodation is compensable as an allowable expense for the injured person's care under MCL 500.3107(1)(a).

4. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — ALLOWABLE EXPENSES — REPLACEMENT SERVICES.

Allowable expenses and replacement services constitute separate and distinct categories of personal protection insurance benefits;

allowable expense are conceptually distinct from replacement services and do not include replacement services (MCL 500.3107[1][a] and [c]).

5. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — ALLOWABLE EXPENSES — REPLACEMENT SERVICES.

A product, service, or accommodation will not be for an injured person's "care," as that term is used in MCL 500.3107(1)(a), unless the need for the product, service, or accommodation was necessitated by the injured person's injuries; even when a particular service is necessary because of the injured person's injuries, that service will not constitute an allowable expense if the service was required both before and after the injury, but after the injury can no longer be provided by the injured person himself or herself; in such cases it is a replacement service subject to the provisions of MCL 500.3107(1)(c) and cannot serve as a basis for recovery under MCL 500.3135(3)(c).

6. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — ALLOWABLE EXPENSES.

The no-fault act does not limit who may perform what is otherwise an allowable expense under MCL 500.3107(1)(a); allowable expenses cannot be for ordinary and necessary services because those service are not for an injured person's care, recovery, or rehabilitation.

*Kemp Klein Law Firm* (by *Alan A. May* and *Lawrence G. Snyder*) for petitioner.

*Garan Lucow Miller, P.C.* (by *Daniel S. Saylor*), for respondent.

ON REMAND

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

M. J. KELLY, J. This case returns to us on remand from our Supreme Court. *In re Carroll*, 493 Mich 899 (2012). We previously had determined that, under MCL 500.3107(1)(a), respondent, Auto Club Insurance Association, had to pay the entire fee of petitioner, Alan A.

May, for services rendered as the conservator of Edward Carroll's estate. See *In re Carroll*, 292 Mich App 395, 407; 807 NW2d 70 (2011). We are called upon to again address this issue, but to do so in light of our Supreme Court's recent decisions in *Johnson v Recca*, 492 Mich 169; 821 NW2d 520 (2012), and *Douglas v Allstate Ins Co*, 492 Mich 241; 821 NW2d 472 (2012). After reviewing those decisions, we conclude that a conservator's fees do not necessarily constitute fees for an injured person's care, recovery, or rehabilitation, even when the injured person would not have needed the conservator's services were it not for his or her injuries. Instead, the conservator's fees will be compensable under MCL 500.3107(1)(a) only to the extent that the conservator's services were directly related to the injured person's care, recovery, or rehabilitation. Because May has not challenged the probate court's finding that only $99 of his fee was related to Carroll's care, recovery, or rehabilitation, we must affirm the probate court's order.

## I. BASIC FACTS

Carroll was permanently disabled after he suffered a closed head injury in an automobile accident in 1982. *In re Carroll*, 292 Mich App at 397. Carroll's wife cared for him until she died in November 2008. *Id*. at 398. Because Carroll was incapable of managing his own property, the probate court appointed May to be Carroll's conservator in December 2008. *Id*.

In March 2009, May petitioned the probate court for an order compelling Auto Club—Carroll's no-fault vehicle insurer—to pay him $6,816.70 in fees for services rendered. *Id*. Auto Club argued that it had no obligation to pay May's fees because his fees were not allowable expenses under MCL 500.3107(1)(a). *In re Carroll*, 292 Mich App at 398. The probate court examined May's

itemized bills and determined that the majority of his services were not related to Carroll's care, recovery, or rehabilitation, as required under MCL 500.3107(1)(a). Accordingly, it ordered Auto Club to pay $99 of May's fee and it ordered Carroll's estate to pay the remainder. *In re Carroll*, 292 Mich App at 398-399.

May then appealed in this Court.

On appeal, this Court did not examine the individual services that May performed for Carroll to determine whether the specific service was for Carroll's care, recovery, or rehabilitation. Instead, we examined whether the appointment of a conservator to handle an injured person's estate was *generally* the type of service that was reasonably necessary for the injured person's care, recovery, or rehabilitation. *Id*. at 400. Relying on the expansive interpretation of the term "care" utilized by the Court in *Heinz v Auto Club Ins Ass'n*, 214 Mich App 195, 198; 543 NW2d 4 (1995), we concluded that, when a court determines that an injured person is so disabled that he or she requires a conservator to handle his or her estate, the services provided by the conservator necessarily qualify as services for the injured person's care. *In re Carroll*, 292 Mich App at 400-403. That is, we concluded that a conservator's fee will always be compensable under MCL 500.3107(1)(a) when the injured person's need for a conservator was itself causally related to an automobile accident.

We rejected Auto Club's contention that the conservator's services were not compensable under MCL 500.3107(1)(a) because the services were, in effect, replacement services under MCL 500.3107(1)(c). We recognized that the issue was complicated by the nature of the conservator's services: a conservator manages the injured person's property and business affairs, which the injured person would likely have performed

on his or her own behalf but for the accident. *In re Carroll*, 292 Mich App at 403-405. Nevertheless, we concluded that a conservator's services were closer to the "care" referred to in MCL 500.3107(1)(a) than to the "ordinary living activities" that are compensated under MCL 500.3107(1)(c). *In re Carroll*, 292 Mich App at 404. Indeed, we characterized a conservator's services as "extraordinary professional services . . . ." *Id*.

Finally, we rejected Auto Club's contention that our Supreme Court's decision in *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521; 697 NW2d 895 (2005), mandated a different result. We acknowledged that our Supreme Court had narrowly interpreted MCL 500.3107(1)(a) to require a direct link between the good or service provided and the injured person's need for care, but distinguished *Griffith* on the facts. See *In re Carroll*, 292 Mich App at 406. Specifically, we noted that there are some services that, although one might be able to characterize them as replacement services in the broadest sense, because the services are so intimately connected to the injured person's care, are compensable under MCL 500.3107(1)(a):

> The conservator's services here are more akin to attendant care provided by a nursing assistant who handles the injured person's intimate hygiene needs; in that situation, although the injured person would normally have handled those needs on his or her own, as a result of the injury he or she is no longer able to do so. Because expenses incurred to have someone perform those hygiene services are reasonably incurred for the injured person's care, recover, or rehabilitation, the nursing assistant's services are compensable under MCL 500.3107(1)(a). Similarly, because the need for the conservator was causally connected to Carroll's injury and the expense is reasonably necessary for his care, it too is compensable under MCL 500.3107(1)(a). [*In re Carroll*, 292 Mich App at 407 (citations omitted).]

We then held that May's entire fee was related to Carroll's care under MCL 500.3107(1)(a). For that reason, we reversed the probate court's opinion and order and remanded for further proceedings. *In re Carroll*, 292 Mich App at 407.

Auto Club then sought leave to appeal in our Supreme Court. Our Supreme Court initially held the application in abeyance pending its decisions in *Johnson* and *Douglas*. *In re Carroll*, 493 Mich 899. After it released those opinions, the Court, in lieu of granting leave to appeal, vacated our judgment and remanded the case back to this Court for reconsideration in light of those decisions. *Id*.

## II. FIRST PARTY NO-FAULT BENEFITS

### A. STANDARD OF REVIEW

This Court reviews de novo the proper interpretation of the no-fault act, MCL 500.3101 *et seq*. *Johnson*, 492 Mich at 173.

### B. NATURE OF THE BENEFITS

"A person injured in an automobile accident is entitled to a variety of personal protection insurance benefits—often referred to as PIP benefits—from his or her insurance carrier under MCL 500.3107." *In re Carroll*, 292 Mich App at 400. The statutory PIP benefits include "four general categories of expenses and losses: survivor's loss, allowable expenses, work loss, and replacement services." *Johnson*, 492 Mich at 173, citing MCL 500.3107 and MCL 500.3108. Two of those categories are relevant here: allowable expenses and replacement services.

The Legislature provided that allowable expenses consist "of all reasonable charges incurred for reason-

ably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a). That is, the Legislature required no-fault insurers to compensate injured persons for the expenses associated with "products, services and accommodations" that were reasonably necessary for the "injured person's care, recovery, or rehabilitation . . . ." MCL 500.3107(1)(a). Notably, the Legislature provided that allowable expenses included expenses reasonably necessary for the care of the injured *person*; it did not limit this category to those expenses necessary to care for the injured person's *injury*. In its broadest sense, the phrase "for an injured person's care," as used in MCL 500.3107(1)(a), can refer to any product, service, or accommodation that one might use to provide for another's well-being. See *The Oxford English Dictionary* (2d ed, 1991) (defining the substantive form of the word "care" to mean "oversight with a view to protection, preservation, or guidance" and defining the verb form as "to take thought for, provide for, look after, take care of"). And traditionally this Court has construed this phrase broadly to refer to any product, service, or accommodation reasonably necessary to care for the person as an injured person. See, e.g., *Heinz*, 214 Mich App at 197-198 (rejecting the argument that the Legislature limited MCL 500.3107[1][a] to "medical care" and stating that "if a person is so seriously injured in an automobile accident that it is necessary to appoint a guardian and conservator for that person," the services are reasonably necessary to provide for the injured person's care); cf. *Griffith*, 472 Mich at 534-536.

The Legislature also provided that no-fault insurers must cover "[e]xpenses not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not

been injured, an injured person would have performed" for his or her own benefit or the benefit of his or her dependents. MCL 500.3107(1)(c). The Legislature did not define this benefit as the "replacement services" benefit. Nevertheless, courts commonly refer to this benefit as the "replacement services" PIP benefit. See, e.g., *Johnson*, 492 Mich at 173, 174 (inserting the label "replacement services" into the statutory scheme and referring to this benefit as the "replacement services" benefit). Traditionally, this benefit applied to all manner of ordinary or mundane household services that the injured person might have performed. See *Fortier v Aetna Cas & Surety Co*, 131 Mich App 784, 793; 346 NW2d 874 (1984) (noting that courts had applied the benefit to expenses for trash disposal, stove repairs, car maintenance, babysitting, plumbing repairs, and woodcutting). However, beginning with its decision in *Griffith* and culminating with its decisions in *Johnson* and *Douglas*, our Supreme Court altered the analytical framework traditionally applied to the benefits provided under MCL 500.3107(1)(a) and MCL 500.3107(1)(c).

### C. *GRIFFITH*

In *Griffith*, our Supreme Court examined whether the cost of a product—food—was compensable as an allowable expense under MCL 500.3107(1)(a). Douglas Griffith had been seriously and permanently injured in a car accident and required assistance to eat and bathe. *Griffith*, 472 Mich at 524. Before returning home, his no-fault insurer had covered the full cost of his inpatient treatment, which included the cost of his meals. *Id*. at 524-525. However, after he returned home, Douglas's no-fault insurer refused to pay for his food. *Id*. at 525. Douglas's wife, Phyllis Griffith, who served as

Douglas's guardian, sued the no-fault insurer to recoup Douglas's food expenses. *Id*.

In determining whether food constituted an allowable expense, our Supreme Court began its analysis by emphasizing the limited nature of no-fault benefits: "According to the plain language of MCL 500.3105(1), a no-fault insurer is only required to pay benefits 'for accidental bodily injury' arising out of an automobile accident." *Griffith*, 472 Mich at 526. The word "for," it explained, implies a causal connection; that is, the insurer's liability to pay benefits under the no-fault act is only triggered "to the extent that the claimed benefits are causally connected to the accidental bodily injury arising out of an automobile accident." *Id*. at 531. In addition, the Court held that a no-fault insurer is liable to pay benefits only for "those injuries that are caused by the insured's use of a motor vehicle." *Id*.

The Court noted that it was uncontested that Douglas Griffith's injuries arose from his use of an automobile, but questioned whether his food expenses were causally related to his injuries: "[Phyllis Griffith] does not claim that her husband's diet is different from that of an uninjured person, that his food expenses are part of his treatment plan, or that these costs are related in any way to his injuries." *Id*. at 531. Because Douglas's food expenses were ordinary, everyday food expenses, the Court concluded that Phyllis Griffith had failed to establish that his food expenses were for accidental bodily injury, as required under MCL 500.3105(1). *Griffith*, 472 Mich at 531-532. Nevertheless, despite having determined that Phyllis had failed to establish the requisite causal link, the Court went on to explain that ordinary food would also not constitute a product for an injured person's care, recovery, or rehabilitation under MCL 500.3107(1)(a). *Griffith*, 472 Mich at 536, 540.

The Court noted that it was undisputed that Douglas's food expenses were not related to his recovery or rehabilitation: "Indeed, [Phyllis Griffith] does not allege that the food has special curative properties that might advance Griffith's recovery or rehabilitation." *Id*. at 532-533. The key issue, it explained, was whether food expenses were compensable as part of Douglas's in-home "care." Although the Court recognized that the ordinary meaning of the term "care" can be broadly understood to encompass anything that is reasonably necessary to the provision of a person's protection or charge, it concluded that the Legislature did not intend to give the term its broadest meaning. *Id*. at 533. Instead, it determined that the word "care" must be understood in context and in light of the fact that the Legislature associated it with the words "recovery" and "rehabilitation." *Id*. 533-534. Using the interpretive tool referred to as *noscitur a sociis*, the Court explained that it must give the word "care" a more limited meaning: "[W]e must neither read 'care' so broadly as to render nugatory 'recovery and rehabilitation' nor construe 'care' so narrowly that the term is mere surplusage." *Id*. at 534.

The Court then went on to conclude that the term "care" referred to the "care" necessitated by the injuries sustained in an automobile accident:

> As noted above, both "recovery" and "rehabilitation" refer to an underlying injury; likewise, the statute as a whole applies only to an "injured person." It follows that the Legislature intended to limit the scope of the term "care" to expenses for those products, services, or accommodations whose provision is *necessitated* by the injury sustained in the motor vehicle accident. "Care" is broader than "recovery" and "rehabilitation" because it may encompass expenses for products, services, and accommoda-

> tions that are necessary because of the accident but that may not restore a person to his preinjury state. [*Id*. at 535 (emphasis added).]

Applying this understanding of the term "care," the Court concluded that Douglas's food expenses were not compensable. It did so, in part, because there was no evidence that "he now requires different food than he did before sustaining his injuries as part of his treatment plan." *Id*. at 536. Although it acknowledged that food was necessary for Douglas's survival, it emphasized that his need for food did not arise from his injuries:

> Unlike prescription medications or nursing care, the food that [Douglas] Griffith consumes is simply an ordinary means of sustenance rather than a treatment for his "care, recovery, or rehabilitation." In fact, if [Douglas] Griffith had never sustained, or were to fully recover from, his injuries, his dietary needs would be no different than they are now. We conclude, therefore, that his food costs are completely unrelated to his "care, recovery, or rehabilitation" and are not "allowable expenses" under MCL 500.3107(1)(a). [*Griffith*, 472 Mich at 536.]

Thus, under the decision in *Griffith*, a no-fault insurer is only obligated to pay benefits for care—as that term is used in MCL 500.3107(1)(a)—when the product, service, or accommodation was necessitated by the injury; that is, if the product, service, or accommodation would not have been necessary but for the injuries sustained in the accident, then it is compensable as an allowable expense for the injured person's care under MCL 500.3107(1)(a).

### D. *JOHNSON*

Our Supreme Court again considered the nature and extent of allowable expenses in *Johnson*. In that case,

John Recca struck Penny Johnson with his vehicle while she was walking. *Johnson*, 492 Mich at 172. Johnson sued Recca's no-fault insurer under MCL 500.3135(3)(c) for benefits in excess of those provided under MCL 500.3107. *Johnson*, 492 Mich at 172. On appeal, our Supreme Court had to determine whether Recca's no-fault insurer had an obligation under MCL 500.3135(3)(c) to compensate Johnson for replacement services beyond that which she would have received under MCL 500.3107(1) had she had her own no-fault insurer. *Johnson*, 492 Mich at 172-173. The Court concluded that this Court had erred when it concluded that replacement services were recoverable as a subcategory of allowable expense. *Id*. at 176.

In deciding this issue, the Court first recognized that the Legislature had abolished tort liability arising from the ownership, maintenance, or use of a motor vehicle, subject only to the exceptions stated under MCL 500.3135. *Johnson*, 492 Mich at 175. The Court then examined the exception provided under MCL 500.3135(3)(c), which provided that a person remains liable in tort for damages " 'for allowable expenses, work loss, and survivor's loss as defined in [MCL 500.3107 to MCL 500.3110] in excess of the daily, monthly, and 3-year limitations contained in those sections.' " *Johnson*, 492 Mich at 175, quoting MCL 500.3135(3) (emphasis omitted). The Court explained that this Court had erred when it treated the Legislature's reference to "allowable expenses" in MCL 500.3135(3)(c) as encompassing replacement services: "The first and most obvious criticism of the Court of Appeals' conclusion that replacement services constitutes a subcategory of allowable expenses is that this simply overlooks the Legislature's own statutory organization, which makes clear that allowable expenses and replacement services constitute separate and distinct categories of PIP benefits." *Johnson*, 492 Mich at 176. The Supreme Court concluded

that the Legislature's decision to specifically refer to allowable expenses under MCL 500.3135(3)(c) and to omit any reference to replacement services showed that the Legislature intended to abolish tort liability for replacement services. *Johnson*, 492 Mich at 175-176 ("MCL 500.3135(3)(c) does not mention damages for replacement services. Therefore, in a third-party tort action, damages for replacement services are not recoverable . . . ."). This, it explained, also followed from the Legislature's decision to organize the statutory provisions in the way that it did. *Johnson*, 492 Mich at 177 ("The Court of Appeals' interpretation improperly rendered the Legislature's organization nugatory by giving no effective meaning to the Legislature's compartmentalization of 'allowable expenses' and 'replacement services.' ").

After determining that the "clear and unambiguous" provisions in MCL 500.3135(3)(c) precluded recovery for replacement services, see *Johnson*, 492 Mich at 175-176, the Court went on to admonish the Court of Appeals for also misreading the decision in *Griffith*. It determined that this Court had erred when it applied an "overly expansive reading of *Griffith*" to conclude that the term "care," as used in MCL 500.3107(1)(a), encompassed any product, service, or accommodation that was necessitated by the injured person's injuries—including replacement services. *Johnson*, 492 Mich at 179. Instead, it held that allowable expenses are conceptually distinct from replacement services and, for that reason, do not include replacement services:

> As we noted in *Griffith*, "the statute does not require compensation for any item that is reasonably necessary to a person's care *in general*." *Griffith*, 472 Mich at 534 (emphasis added). Rather, such care "must be related to the insured's injuries." *Id*. In *Griffith*, the plaintiff's food costs were not allowable expenses because "if Griffith had never sustained, or were to fully recover from, his injuries, his

> dietary needs would be no different than they are now." *Id*. at 536. Accordingly, allowable expenses do not include expenses for products or services that are required after the injury in a manner indistinguishable from those required before the injury. Those services are not properly characterized as "related to the insured's injuries."
>
> Services that were required both before and after the injury, but after the injury can no longer be provided by the injured person himself or herself *because* of the injury, are "replacement services," not "allowable expenses." They are services "in lieu of those that, if he or she had not been injured, an injured person would have performed . . . for the benefit of himself or herself . . . ." MCL 500.3107(1)(c). Thus, contrary to the Court of Appeals' interpretation of *Griffith*'s definition of "care," replacement services is not "merely one category of allowable expenses"; rather, allowable expenses and replacement services are separate and distinct categories of PIP benefits. [*Johnson*, 492 Mich at 179-180.]

Accordingly, *Griffith* established that a product, service, or accommodation will not be for an injured person's "care," as that term is used in MCL 500.3107(1)(a), unless the need for the product, service, or accommodation was necessitated by the injured person's injuries. *Griffith*, 472 Mich at 535. However, under the decision in *Johnson*, even when a particular service is necessary because of the injured person's injuries, that service will not constitute an allowable expense if the service was "required both before and after the injury, but after the injury can no longer be provided by the injured person himself or herself . . . ." *Johnson*, 492 Mich at 180. In such cases, the service is a replacement service subject to the provisions of MCL 500.3107(1)(c) and cannot serve as the basis for recovery under MCL 500.3135(3)(c). *Johnson*, 492 Mich at 180, 197.

E. *DOUGLAS*

Finally, in *Douglas*, our Supreme Court further refined its understanding of the term "care" to provide guidance on the types of services that will constitute an allowable expense under MCL 500.3107(1)(a). In that case, an unidentified driver struck James Douglas while he was riding his bicycle. *Douglas*, 492 Mich at 249. Douglas suffered a severe closed head injury from the hit-and-run accident, which led to psychiatric problems including difficulty with his short-term memory, impulsivity, and two suicide attempts. *Id*. at 250. Douglas eventually sued the insurer assigned to cover his claims for failing to pay PIP benefits. *Id*. at 250-251.

On appeal, our Supreme Court had to consider whether and to what extent Douglas was entitled to compensation for the attendant care services that his wife performed, and, specifically, whether his wife's services were allowable expenses under MCL 500.3107(1)(a) or, in the alternative, replacement services under MCL 500.3107(1)(c). *Douglas*, 492 Mich at 255. Citing its decision in *Griffith*, the Court first reemphasized that MCL 500.3105(1) imposes an obligation to pay benefits on an insurer only when two threshold causation requirements are met: (1) the claimed benefits must be " 'causally connected to the accidental bodily injury arising out of an automobile accident' " and (2) the injury itself must arise from the ownership, operation, maintenance, or use of a motor vehicle. *Douglas*, 492 Mich at 257, quoting *Griffith*, 472 Mich at 531. It then went on to note that MCL 500.3107(1)(a) and MCL 500.3107(1)(c) impose further restrictions on the benefits. *Douglas*, 492 Mich at 257-258. These additional limits were important, the Court explained, because the allowable-expense benefit was subject to the one-year-back rule, see MCL

500.3145(1), and an injured person could only recover for replacement services for the first three years after the accident. *Douglas*, 492 Mich at 258-259. Given that Douglas's wife provided her services long after the expiration of the three-year period, Douglas would only be entitled to compensation for those services that qualified as allowable expenses and then only for those expenses incurred after May 31, 2004. *Id*. at 259.

Turning to what constitutes "care" for purposes of MCL 500.3107(1)(a), the *Douglas* Court reaffirmed that "care" has a limited meaning: "although services for an insured's care need not restore a person to his preinjury state, the services must be related to the insured's injuries to be considered allowable expenses." *Douglas*, 492 Mich at 260. The Court then approvingly cited cases from this Court for the proposition that the no-fault act does not limit who "may perform what is otherwise an allowable expense" under MCL 500.3107(1)(a). *Douglas*, 492 Mich at 261, citing *Van Marter v American Fidelity Fire Ins Co*, 114 Mich App 171; 318 NW2d 679 (1982), and *Visconti v Detroit Auto Inter-Ins Exch*, 90 Mich App 477; 282 NW2d 360 (1979). Thus, MCL 500.3107(1)(a) can apply to services performed by a family member:

> A subsequent Court of Appeals panel applied *Visconti* and allowed the plaintiff to recover no-fault benefits when a family member was "required to serve his meals in bed, bathe him, escort him to the doctor's office, exercise him in conformity with his doctor's instructions, assist in formulating his diet, administer medication, and assist him with speech and associational therapy." The Court also held that, even though the family member who provided these services was not a licensed medical care provider, "[t]he statute does not require that these services be supplied by 'trained medical personnel'." In other words, while the no-fault act specifies and limits what types of expenses are compensable, it places no limitation on *who* may perform

> what is otherwise an allowable expense. [*Douglas*, 492 Mich at 261, quoting *Van Marter*, 114 Mich App at 180.]

However, the Court clarified that allowable expenses "cannot be for 'ordinary and necessary services' because ordinary and necessary services are not 'for an injured person's care, recovery, or rehabilitation.' " *Douglas*, 492 Mich at 262.

Examining the facts applicable to its case, the Court held that Douglas was potentially entitled to compensation for his wife's services:

> The Court of Appeals rejected defendant's claim that Mrs. Douglas only provided replacement services and compared the claimed supervision with this state's workers' compensation caselaw that allows "on-call" supervision, even when the care provider is pursuing other tasks while on call. We affirm the result of the Court of Appeals on this issue and hold that defendant is not entitled to a verdict of no cause of action on the basis of its claim that Mrs. Douglas *only* provided replacement services because there was testimony given at trial that at least some of the services she said she had provided were consistent with the requirement of MCL 500.3107(1)(a) that allowable expenses be for an injured person's care as necessitated by the injury sustained in the motor vehicle accident. For instance, even if Mrs. Douglas's claimed supervision of plaintiff does not restore plaintiff to his preinjury state, testimony given at trial indicates that arguably at least some of this claimed supervision was for plaintiff's care as necessitated by the injury sustained in the motor vehicle accident and not for ordinary and necessary services that every Michigan household must undertake. Accordingly, defendant is not entitled to relief on the claim that *none* of Mrs. Douglas's claimed services could be considered attendant care services within the meaning of MCL 500.3107(1)(a). [*Douglas*, 492 Mich at 263-264.][1]

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[1] The Court also examined the proofs necessary to establish that the expenses were reasonably necessary, actually incurred, and amounted to

The decision in *Douglas* clarified that an injured person may be entitled to compensation for services necessitated by his or her injury and performed for his or her care as an allowable expense under MCL 500.3107(1)(a) and that such services may be compensable even when performed by a family member; the Court, however, reiterated that the services provided by a family member must be carefully distinguished from the types of services that constitute a replacement service under MCL 500.3107(1)(c). *Douglas*, 492 Mich at 262.

### F. SYNTHESIZING *GRIFFITH*, *JOHNSON*, AND *DOUGLAS*

Examining the decisions in *Griffith*, *Johnson*, and *Douglas* together, it is evident that there are several criteria that must be established before a particular product, service, or accommodation "for an injured person's care, recovery, or rehabilitation" will be compensable as an allowable expense under MCL 500.3107(1)(a). The claimed benefits must first be " 'causally connected to the accidental bodily injury arising out of an automobile accident' " and the injury itself must arise from the ownership, operation, maintenance, or use of a motor vehicle. *Douglas*, 492 Mich at 257, quoting *Griffith*, 472 Mich at 531. Allowable benefits are, however, limited to those benefits that are for the injured person's care, recovery, or rehabilitation, which means that the product, service, or accommodation must have been "necessitated by the injury sustained in the motor vehicle accident." *Griffith*, 472 Mich at 535. Moreover, even when a particular service is necessitated by the injured person's injuries, that service will not constitute an allowable expense if the

a reasonable charge. *Douglas*, 492 Mich at 264-277. However, those elements are not at issue in this case.

service is an ordinary service that was "required both before and after the injury, but after the injury can no longer be provided by the injured person himself or herself . . . ." *Johnson*, 492 Mich at 180. In such cases, the service is a replacement service that is compensable, if at all, under MCL 500.3107(1)(c), and not under MCL 500.3107(1)(a). *Johnson*, 492 Mich at 180.

### III. APPLYING THE LAW

In this case, it is undisputed that Carroll suffered a closed head injury in an automobile accident and that his head injury prevented him from handling his own estate. For that reason, May has established the requisite causal connections between his services and Carroll's injuries: the probate court appointed May to serve as Carroll's conservator because the head injury that Carroll suffered during an automobile accident so incapacitated him that he can no longer manage his estate. See *Douglas*, 492 Mich at 257. Similarly, because Carroll cannot manage his own estate as a result of his injuries, it follows that May's services were necessitated by those injuries. *Griffith*, 472 Mich at 535. Thus, the only remaining question is whether May's services were for ordinary and necessary services that Carroll would have performed for himself had he not been injured.

Examining the evidence, we conclude that some of May's services constituted replacement services under MCL 500.3107(1)(c) that were, accordingly, not compensable under MCL 500.3107(1)(a). However, we also conclude that some of May's services were not replacement services and were otherwise necessary for Carroll's care within the meaning of MCL 500.3107(1)(a).

The average member of a Michigan household manages his or her own estate on a day-to-day basis; ordinary people pay bills, make deposits, buy and sell

property, hire brokers, and otherwise plan for their future needs. Carroll's need for ordinary household management existed before his accident and continued to exist after his accident. Therefore, to the extent that May performed those services for Carroll, they would be compensable under MCL 500.3107(1)(c), rather than under MCL 500.3107(1)(a), because his need for ordinary household management is not specifically related to his injuries. See *Johnson*, 492 Mich at 180.

But Carroll also clearly had, and presumably continues to have, additional estate-management needs as a result of his head injury—needs that go far beyond those that he required before he was injured. Carroll requires someone to manage his medical bills, negotiate with medical providers and insurers, and marshal his assets and handle them in a way that will ensure that he can continue to receive the best possible physical and mental care. As our Supreme Court approvingly noted in *Douglas*, attendant care can include services that the injured person might have performed before he or she was injured as long as those services are not the type of ordinary tasks that a family member might perform for the benefit of the household as a whole. See *Douglas*, 492 Mich at 261 (noting that allowable expenses include services such as serving the injured person meals in bed, aiding the injured person with bathing, dressing, and exercise, and escorting the injured person to the doctor, administering medication, and assisting with dietary planning and therapies). Although these services will typically be related to the injured person's physical care, we must emphasize that the Legislature did not define allowable expenses to include only those expenses that involve the direct application of care to the injured person. Rather, the Legislature provided that compensation must be made for "products, services and accommodations" for the "*injured person's* care,

recovery, or rehabilitation." MCL 500.3107(1)(a) (emphasis added). That is, the care need not be specifically directed to the care of the injured person's injury or disability, but rather must be related to his or her peculiar needs as an *injured person*. See *In re Geror*, 286 Mich App 132, 135-136; 779 NW2d 316 (2009) (holding that a lawyer's fees were an allowable expense under MCL 500.3107(1)(a) because they were related to ensuring that the injured person received the necessary care).

Consequently, consistent with *Griffith*, *Johnson*, and *Douglas*, if an injured person—by reason of his or her injuries—requires a service in order to ensure his or her proper care, and that service does not amount to a replacement service under MCL 500.3107(1)(c), it will be compensable under MCL 500.3107(1)(a). See *Johnson*, 492 Mich at 180; *Douglas*, 492 Mich at 262-264; *Griffith*, 472 Mich at 535. Here, many of Carroll's financial-management needs are extraordinary and peculiar to Carroll's status as an *injured person*. And, because those needs are beyond those that would ordinarily be performed by a member of the household, they are compensable under MCL 500.3107(1)(a) as a service provided for Carroll's care, recovery, or rehabilitation.

The probate court correctly determined that some of May's services as Carroll's conservator were compensable under MCL 500.3107(1)(a) and some were not because they were for ordinary and necessary household services that were compensable under MCL 500.3107(1)(c) and were incurred more than three years after Carroll's accident. Moreover, May did not challenge the probate court's findings concerning the specific services that were compensable and the amount due for those services. Consequently, May has not identified any error warranting relief.

## IV. CONCLUSION

The probate court did not err when it determined that Auto Club only had to compensate May for those services he performed as Carroll's conservator that did not amount to replacement services under MCL 500.3107(1)(c). Because May did not challenge the probate court's specific findings in this regard, we must affirm.

Affirmed. As the prevailing party, Auto Club may tax its costs. MCR 7.219(A).

BECKERING, P.J., and WHITBECK, J., concurred with M. J. KELLY, J.

DUNCAN v STATE OF MICHIGAN

Docket No. 307790. Submitted December 12, 2012, at Lansing. Decided April 2, 2013, at 9:05 a.m. Application for leave to appeal dismissed on stipulation, 494 Mich ___.

Christopher L. Duncan and seven other individuals brought an action in the Ingham Circuit Court against the state of Michigan and the Governor, challenging the indigent defense system employed in Berrien, Genesee, and Muskegon Counties and seeking injunctive relief, through a class action, to improve the quality of indigent representation. The proposed class consisted of present and future indigent criminal defendants who require appointed counsel. Defendants moved for summary disposition under MCR 2.116(C)(4), (7), and (8), arguing, among other things, that plaintiffs' preconviction claims were nonjusticiable because plaintiffs had failed to meet the certification requirements for a class action, had failed to properly plead a valid cause of action against defendants, and lacked standing. The court, Laura Baird, J., granted the motion for class certification and denied summary disposition for defendants, and defendants appealed. The Court of Appeals, MURPHY, P.J., and SAWYER, J. (WHITBECK, J., dissenting), held that plaintiffs, on the basis of the pleadings and at that juncture in the lawsuit, had sufficiently set forth facts that (1) established standing, (2) established that the case was ripe for adjudication, and (3) stated claims on which declaratory and injunctive relief could be granted and that the trial court had properly granted the motion for class certification. The dissent would have held that defendants were entitled to summary disposition because granting plaintiffs relief would violate the separation of powers and plaintiffs had failed to state a proper claim for relief, lacked standing, and had pleaded unripe claims and would have further held that the trial court had improperly certified a class action. 284 Mich App 246 (2009). Defendants sought leave to appeal. In an order entered April 30, 2010, the Supreme Court vacated the trial court's order certifying the class and remanded the case to the trial court for reconsideration of the motion for class certification in light of *Henry v Dow Chem Co*, 484 Mich 483 (2009). With respect to defendants' appeal of the denial of summary disposition, the Supreme Court affirmed the result only of the Court of Appeals majority for different reasons, noting that the

case was in its earliest stages and that from plaintiffs' pleadings only it was premature to make a decision on substantive issues. Thus, defendants were not entitled to summary disposition at that time. 486 Mich 906 (2010). On July 16, 2010, the Supreme Court granted reconsideration, vacated its April 30 order, and reversed the Court of Appeals' judgment for the reasons stated in the Court of Appeals dissent, specifically noting that plaintiffs' claims were not justiciable. 486 Mich 1071 (2010). The Supreme Court subsequently granted reconsideration again on November 30, 2010, vacated its July 16 order and reinstated its April 30 order on the ground that reconsideration had been improperly granted. 488 Mich 957 (2010). On December 29, 2010, the Supreme Court denied reconsideration of its November 30 order. 488 Mich 1011 (2010). Accordingly, pursuant to the Supreme Court's April 30 order, the matter returned to the trial court, which decided to permit discovery before ruling on the motion for class certification. Defendants again moved for summary disposition, arguing that (1) discovery was inappropriate because the Supreme Court had remanded for consideration of the pending motion, not a renewed motion with the benefit of discovery, (2) plaintiffs' class action should not be certified, (3) plaintiffs lacked standing, (4) plaintiffs had failed to state a claim on which relief could be granted, (5) res judicata barred plaintiffs' claims, and (6) plaintiffs were judicially estopped from objecting to defendants' challenges. The trial court denied the motion, concluding that *Henry* required discovery before deciding a class certification motion, that the court could not reconsider defendants' motion under MCR 2.116(C)(8) because the Supreme Court and Court of Appeals had already decided those matters in plaintiffs' favor, and that defendants had failed to establish any element of res judicata. Defendants appealed.

The Court of Appeals *held*:

1. Defendants argued that the trial court inappropriately ordered discovery and that plaintiffs had not met their burden of establishing that each prerequisite for class certification was satisfied. For a court to grant a motion for class certification, the requirements of MCR 3.501(A)(1) and (2) must be satisfied. The court cannot rubber-stamp allegations in a pleading that baldly proclaim that the class-certification requirements have been satisfied, but the court also cannot evaluate the merits of the plaintiff's claims. A court may base its decision on the pleadings alone only if the pleadings set forth sufficient information to satisfy the court that each prerequisite is in fact met. If the pleadings are not sufficient, the court must look to additional

information beyond the pleadings to determine whether class certification is proper. Under MCR 3.501(B)(3)(b), the court may allow the action to be maintained as a class action, may deny the motion, or may order that a ruling be postponed pending discovery or other preliminary procedures. The trial court did not certify plaintiffs' action as a class action, however, but merely denied the summary disposition motion until discovery could be completed, as permitted under the court rule. Nor did the trial court's denial of defendants' motion on the basis that the motion was premature contravene the Supreme Court's order. The trial court obeyed the Supreme Court's order to consider the class-certification question in light of *Henry*.

2. The trial court did not err by denying the state's motion for summary disposition under MCR 2.116(C)(8). The Court of Appeals had previously held that plaintiffs properly stated claims on which declaratory and injunctive relief could be awarded, thus defeating defendants' motion under MCR 2.116(C)(8). The Supreme Court later affirmed, albeit in result only, opining that it was premature to make a decision on the substantive issues solely on the basis of plaintiffs' pleadings. Thus, the only proper question for the Court of Appeals to address was whether defendants' argument was foreclosed under the doctrine of the law of the case. Generally, the doctrine provides that an appellate court's decision will bind a trial court on remand and the appellate court in subsequent appeals. If a case is taken on appeal to a higher appellate court, the law of the case announced in the higher appellate court supersedes that set forth in the intermediate appellate court, but rulings of the intermediate appellate court remain the law of the case insofar as they are not affected by the opinion of the higher court reviewing the lower court's determination. The doctrine is usually considered discretionary—a general practice by the courts to avoid inconsistent judgments as opposed to a limit on the power of the courts—but the Court of Appeals must apply the doctrine when there has been no material change in the facts or intervening change in the law. Even if the prior decision was erroneous, that alone is insufficient to avoid application of the doctrine. The law of the case doctrine applied in this case. The Court of Appeals previously held that plaintiffs had pleaded causes of action for which declaratory and injunctive relief could be granted, and the Supreme Court affirmed. Defendants did not establish a material change of fact or an intervening change in the law that would have allowed avoidance of application of the doctrine and reconsideration of defendants' motion for summary disposition.

3. Judicial estoppel did not bar plaintiffs from relying on the law of the case doctrine to preclude reconsideration of defendants' motion under MCR 2.116(C)(8) because defendants failed to establish the requirements of judicial estoppel. Judicial estoppel prevents a party from asserting one position when that party successfully and unequivocally asserted a position in a prior proceeding that was wholly inconsistent with the position later taken. However, the mere assertion of inconsistent positions is not sufficient to invoke estoppel. There must be some indication that the court in the earlier proceeding accepted that party's position as true. Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent. Defendants contended that plaintiffs should be judicially estopped from relying on the law of the case doctrine because they had argued before the Supreme Court that there was no motion under MCR 2.116(C)(8) before it. Even if that was a wholly inconsistent statement, however, the Supreme Court affirmed the Court of Appeals' decision regarding defendants' motion for summary disposition, albeit in result only.

4. Defendants argued that the intervening change in the law of standing in Michigan following the Supreme Court's decision in *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349 (2010) (*LSEA*), allowed them to reargue the question of plaintiffs' standing and that the trial court erred by failing to decide that plaintiffs lack standing under *LSEA*. When this case was initially decided, Michigan used the federal tripartite standing test that required a plaintiff to demonstrate (1) an injury in fact that was concrete, particularized, and either actual or imminent, (2) that the injury was fairly traceable (causally linked to) the defendant's conduct, and (3) that the remedy sought would likely redress the plaintiff's injuries. *LSEA* reinstituted Michigan's prior standing test, which automatically confers standing on any party who has a legal cause of action, regardless of whether the underlying issue is justiciable. If a specific cause of action at law does not exist for the plaintiff, then the plaintiff may have standing if the plaintiff has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the plaintiff. Although the law of the case doctrine does not necessarily apply when there has been an intervening change in the law, the Supreme Court clearly reinstated its original decision affirming the Court of Appeals' judgment in this case after it decided *LSEA*. The law of case doctrine therefore applied because the Supreme Court implicitly decided under *LSEA* the issue of plaintiffs' standing. The Court of Appeals was bound

by stare decisis to follow *LSEA* and could not discard it as unworkable and apply the prior test.

5. Defendants argued that the doctrine of res judicata barred plaintiffs' claims because plaintiffs were attempting to litigate the effectiveness of their indigent criminal defense counsel in this subsequent civil action when they could or should have raised the issue of ineffective assistance of counsel during their criminal proceedings. The doctrine of res judicata precludes relitigation of a claim when it is predicated on the same underlying transaction that was litigated in a prior case. Res judicata applies if (1) the prior action was decided on the merits, (2) the prior decision resulted in a final judgment, (3) both actions involved the same parties or those in privity with the parties, and (4) the issues presented in the subsequent case were or could have been decided in the prior case. For purposes of res judicata, parties are in privity with each other when they are so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert. Res judicata applies to multiple claims arising out of a single transaction. The issues presented in this civil case regarding defendants' alleged deprivation of plaintiffs' constitutional rights through a deficient indigent criminal defense system were not and could not have been raised in the plaintiffs' individual criminal prosecutions. The remedy that plaintiffs sought through a class action, i.e., improvements to the indigent criminal defense system, could not have been achieved during their prior criminal proceedings. Without an action such as this, and assuming that plaintiffs' allegations are true, indigent persons accused of crimes in Michigan would continue to be subject to inadequate legal representation without remedy unless the representation adversely affected the outcome. Our system of justice requires effective representation, not ineffective but non-outcome-determinative representation. Further, as plaintiffs' proposed class includes indigent people who might not have been convicted of crimes, there has been no final decision on the merits in those cases. Res judicata did not bar plaintiffs' claims.

Affirmed.

WHITBECK, P.J., concurring in part and dissenting in part, concurred in the majority's holding on class certification, judicial estoppel (with respect to result), and standing (with respect to result under *LSEA* and fully with respect to overruling *LSEA*). He concluded, however, following a detailed review of the Supreme Court's confusing and contradictory orders in the case, that it was impossible to extract a law of the case from them. He further

believed that it would be impossible for plaintiffs to prevail on the claims they set forth, even under the most liberal interpretation of those claims and presuming every single fact alleged to be true, because none of the claims was judicially cognizable. Judge WHITBECK would therefore have reversed and remanded the case to the trial court for entry of summary disposition in favor of defendants.

1. ACTIONS — CLASS ACTIONS — GRANTING MOTIONS ON THE BASIS OF PLEADINGS — DISCOVERY.

For a trial court to grant a motion for class certification, the requirements of MCR 3.501(A)(1) and (2) must be satisfied; the court cannot rubber-stamp allegations in a pleading that baldly proclaim that the class-certification requirements have been satisfied, but the court also cannot evaluate the merits of the plaintiff's claims; the court may base its decision on the pleadings alone only if the pleadings set forth sufficient information to satisfy the court that each prerequisite is in fact met; if the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper; under MCR 3.501(B)(3)(b), the court may allow the action to be maintained as a class action, may deny the motion, or may order that a ruling be postponed pending discovery or other preliminary procedures.

2. APPEAL — DOCTRINE OF THE LAW OF THE CASE — APPLICATION.

Generally, the doctrine of the law of the case provides that an appellate court's decision will bind a trial court on remand and the appellate court in subsequent appeals; if a case is appealed in a higher appellate court, the law of the case announced in the higher appellate court supersedes that set forth in the intermediate appellate court, but rulings of the intermediate appellate court remain the law of the case insofar as they are not affected by the opinion of the higher court reviewing the lower court's determination; the doctrine is usually considered discretionary rather than a limit on the power of the courts, but the Court of Appeals must apply the doctrine when there has been no material change in the facts or intervening change in the law; even if the prior decision was erroneous, that alone is insufficient to avoid application of the doctrine.

3. ESTOPPEL — JUDICIAL ESTOPPEL — APPLICATION.

Judicial estoppel prevents a party from asserting one position when that party successfully and unequivocally asserted a position in a prior proceeding that was wholly inconsistent with the position now taken; the mere assertion of inconsistent positions, however,

> is not sufficient to invoke estoppel; there must be some indication that the court in the earlier proceeding accepted that party's position as true; further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent.

*Frank D. Eamon PLLC* (by *Frank D. Eamon*), *Mark Granzotto, PC* (by *Mark R. Granzotto*), *Michael J. Steinberg*, *Kary L. Moss*, and *Mark P. Fancher* for plaintiffs.

*Bill Schuette*, Attorney General, *John J. Bursch*, Solicitor General, *Richard A Bandstra*, Chief Legal Counsel, and *Ann M. Sherman* and *Margaret A. Nelson*, Assistant Attorneys General, for defendants.

Before: WHITBECK, P.J., and FITZGERALD and BECKERING, JJ.

BECKERING, J. Defendants, the state and the Governor of Michigan (collectively "the state"), appeal by leave granted the trial court's order dated December 15, 2011, denying the state's motion for summary disposition. For the reasons set forth in this opinion, we affirm and lift the stay previously imposed by this Court.

## I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case returns to this Court after a remand by our Supreme Court to the trial court. Plaintiffs filed suit challenging the sufficiency of the state's indigent criminal defense system and sought, through a class action, injunctive relief to improve the quality of indigent representation throughout Michigan. Plaintiffs' proposed class consists of present and future indigent criminal defendants who require counsel appointed through our indigent criminal defense system. The state previously moved for summary disposition under MCR 2.116(C)(4), (7), and (8), arguing, among other

things, that plaintiffs' preconviction claims were nonjusticiable because plaintiffs (a) had failed to meet the certification requirements of a class action, (b) had failed to properly plead a valid cause of action against the state, and (c) lacked standing. The trial court disagreed and certified plaintiffs' class.

On appeal, a majority of this Court held that

> on the basis of the pleadings and at this juncture in the lawsuit, plaintiffs have sufficiently alleged facts that, if true, establish standing, establish that the case is ripe for adjudication, and state claims upon which declaratory and injunctive relief can be awarded. Finally, we hold that the trial court properly granted the motion for class certification. [*Duncan v Michigan*, 284 Mich App 246, 343; 774 NW2d 89 (2009).]

In a dissenting opinion, Judge WHITBECK opined that the state was entitled to summary disposition for the following reasons: (1) granting relief to plaintiffs would violate the separation of powers, (2) plaintiffs had failed to state a proper claim for relief, lacked standing, and had pleaded unripe claims, and (3) plaintiffs' action was incorrectly certified as a class action. *Id*. at 346, 371, 376, 385-388, 395-399 (WHITBECK, J., dissenting).

The state sought leave to appeal in our Supreme Court. In *Duncan v Michigan*, 486 Mich 906 (2010), our Supreme Court ordered as follows:

> Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we hereby vacate the trial court's order granting the plaintiffs' motion for class certification and remand this case to the Ingham Circuit Court for reconsideration of the plaintiffs' motion for class certification in light of this Court's opinion in *Henry v Dow Chemical Co*, 484 Mich 483 [772 NW2d 301] (2009).
>
> As to the defendants' appeal of the decision on their motion for summary disposition, we hereby affirm the result

> only of the Court of Appeals majority for different reasons. This case is at its earliest stages and, based solely on the plaintiffs' pleadings in this case, it is premature to make a decision on the substantive issues. Accordingly, the defendants are not entitled to summary disposition at this time.
>
> We do not retain jurisdiction.

The Supreme Court subsequently granted reconsideration and reversed this Court's decision for the reasons stated in Judge WHITBECK's dissenting opinion. *Duncan v Michigan*, 486 Mich 1071 (2010). However, our Supreme Court later reinstated its original order affirming this Court's decision and remanding the matter to the trial court. *Duncan v Michigan*, 488 Mich 957 (2010).

On remand, the trial court held a status conference and decided to permit the parties to conduct discovery before deciding plaintiffs' motion for class certification. Before a single deposition was taken, however, the state renewed its motion for summary disposition, arguing the following: (1) discovery was inappropriate because the Supreme Court had remanded for consideration of plaintiffs' pending class-certification motion and not a renewed motion with the benefit of discovery, (2) plaintiffs' claims should not be certified as a class action, (3) plaintiffs lacked standing, (4) plaintiffs had failed to state a proper claim for which relief could be granted, (5) res judicata barred plaintiffs' claims, and (6) plaintiffs could not object to the state's challenges because of judicial estoppel. The trial court denied the state's motion, holding that (a) it was premature to decide plaintiffs' class-certification motion because *Henry* required the court to take discovery before deciding a certification motion, (b) it could not reconsider the state's MCR 2.116(C)(8) motion or plaintiffs' standing because both this Court and our Supreme Court had already decided those matters in plaintiffs' favor, and (c) the state had failed to establish any of the elements of res judicata.

## II. ANALYSIS

### A. CLASS CERTIFICATION

The state first argues that the trial court erroneously failed to dismiss plaintiffs' motion for class certification when it denied the state's motion for summary disposition. The state suggests that the trial court inappropriately ordered discovery and insists that plaintiffs "have not met their burden of establishing that each certification prerequisite has been satisfied." We reject this argument.

We review de novo a trial court's decision on a motion for summary disposition. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). "[T]he analysis a trial court must undertake in order to determine whether to certify a proposed class may involve making both findings of fact *and* discretionary determinations"; therefore, we review a trial court's factual findings regarding class certification for clear error and the decisions within the trial court's discretion for an abuse of discretion. *Henry*, 484 Mich at 495-496. State courts "have broad discretion to determine whether a class will be certified." *Id*. at 504. An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). The interpretation and application of a court rule is a question of law that we review de novo. *Snyder v Advantage Health Physicians*, 281 Mich App 493, 500; 760 NW2d 834 (2008).

For a court to grant a motion for class certification, the requirements of MCR 3.501(A)(1) and (2) must be satisfied. *Henry*, 484 Mich at 488, 496-497. MCR 3.501(A)(1) requires that a proposed class of plaintiffs establish the following elements: (1) the class is suffi-

ciently numerous that joinder of all members is impracticable, (2) the common questions of fact or law predominate over matters relevant to only individual plaintiffs, (3) the claims of the class representatives are typical of the claims available to the entire class, (4) the class representatives will fairly and adequately represent the interests of the entire class, and (5) the class-action mechanism is superior to other methods of adjudication. *Id*. at 496-497. In evaluating the "superiority" element, MCR 3.501(A)(2) requires consideration of the following nonexclusive factors:

> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
>
> (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
>
> (c) whether the action will be manageable as a class action;
>
> (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
>
> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and

> (f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

The trial court cannot rubber-stamp allegations in a pleading that baldly proclaim that the class-certification requirements have been satisfied, but the trial court also cannot evaluate the merits of the plaintiffs' claims. *Henry*, 484 Mich at 502-503. "A court may base its decision on the pleadings alone *only if* the pleadings set forth sufficient information to satisfy the court that each prerequisite is in fact met." *Id*. at 502. "If the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper." *Id*. at 503. "The court may allow the action to be maintained as a class action, may deny the motion, or may order that a ruling be postponed pending discovery or other preliminary procedures." MCR 3.501(B)(3)(b).

We conclude that the state's argument fails for three reasons. First, the trial court did not certify plaintiffs' action as a class action; it merely denied the dispositive motion until discovery could be completed. Second, the trial court did not abuse its discretion by postponing the class-certification question until discovery could be completed. The trial court is required to consider facts outside the pleadings if the pleadings are insufficient to establish plaintiffs' entitlement to class certification. *Henry*, 484 Mich at 502-503. Under MCR 3.501(B)(3)(b), the trial court could postpone the class-certification question pending discovery.[1] Thus, its de-

[1] Indeed, when explaining that a court must examine "additional information beyond the pleadings" if the pleadings are insufficient to determine whether class certification is proper, the *Henry* Court expressly referred to a trial court's authority to permit discovery under MCR 3.501(B)(3)(b). *Henry*, 484 Mich at 503 & n 35.

cision to do so did not fall outside the range of principled outcomes. Third, the trial court's denial of the state's motion on the basis that the motion was premature did not contravene the Supreme Court's order. The trial court was in fact obeying our Supreme Court's order to consider the class-certification question in light of *Henry*. On remand, a trial court is required to comply with a directive from an appellate court. *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 128; 737 NW2d 782 (2007).

Accordingly, the trial court did not err by denying the state's motion for summary disposition with respect to the issue of class certification.

### B. FAILURE TO STATE A CLAIM

Next, the state argues that the trial court erroneously denied its dispositive motion under MCR 2.116(C)(8) because plaintiffs had plainly failed to plead a proper cause of action. We disagree.

This Court previously held that plaintiffs had properly stated "claims upon which declaratory and injunctive relief can be awarded," thus defeating the state's motion under MCR 2.116(C)(8). *Duncan*, 284 Mich App at 343. Our Supreme Court later affirmed, albeit in result only, opining that solely on the basis of "plaintiffs' pleadings in this case, it is premature to make a decision on the substantive issues." *Duncan*, 486 Mich at 906. Thus, the only proper question for this Court to address is whether the state's argument is foreclosed under the law of the case doctrine.

Whether the law of the case doctrine applies is a question of law that we review de novo. *Kasben v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008). Generally, the law of the case doctrine provides that an appellate court's decision "will bind a trial court

on remand and the appellate court in subsequent appeals." *Schumacher*, 275 Mich App at 127. "Where a case is taken on appeal to a higher appellate court, the law of the case announced in the higher appellate court supersedes that set forth in the intermediate appellate court." *Johnson v White*, 430 Mich 47, 53; 420 NW2d 87 (1988). However, "[r]ulings of the intermediate appellate court . . . remain the law of the case insofar as they are not affected by the opinion of the higher court reviewing the lower court's determination." *Id*. The law of the case doctrine has been described as discretionary—as a general practice by the courts to avoid inconsistent judgments—as opposed to a limit on the power of the courts. *Foreman v Foreman*, 266 Mich App 132, 138; 701 NW2d 167 (2005). However, these decisions also acknowledge this Court's mandatory obligation to apply the doctrine when there has been no material change in the facts or intervening change in the law. *Id*.; see also *Reeves v Cincinnati, Inc (After Remand)*, 208 Mich App 556, 560; 528 NW2d 787 (1995) ("[T]he doctrine of law of the case is a bright-line rule to be applied virtually without exception."). Even if the prior decision was erroneous, that alone is insufficient to avoid application of the law of the case doctrine. *Bennett v Bennett*, 197 Mich App 497, 500; 496 NW2d 353 (1992); see also *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997).

We conclude that the law of the case doctrine applies in this case regarding whether plaintiffs pleaded a proper cause of action. We previously held that plaintiffs had pleaded causes of action for which declaratory and injunctive relief could be granted, and our Supreme Court affirmed. The state has not established a material change of fact or an intervening change in the law that would allow this Court to avoid application of the law of

the case doctrine and reconsider the state's motion for summary disposition under MCR 2.116(C)(8).

The state contends that plaintiffs should be judicially estopped from relying on the law of the case doctrine because they argued before the Supreme Court that "there is no (C)(8) motion before you with respect to whether relief can be granted against the Governor." Judicial estoppel prevents a party from asserting one position when that party "successfully and 'unequivocally' asserted a position in a prior proceeding that is 'wholly inconsistent' with the position now taken." *Szyszlo v Akowitz*, 296 Mich App 40, 51; 818 NW2d 424 (2012) (citation omitted). Significantly, "the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true. Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent." *Paschke v Retool Indus*, 445 Mich 502, 510; 519 NW2d 441 (1994). This "prior success" model "focus[es] less on the danger of inconsistent claims, than on the danger of inconsistent rulings." *Id*. at 510 n 4.

Judicial estoppel does not bar plaintiffs from relying on the law of the case doctrine to preclude reconsideration of the state's motion pursuant to MCR 2.116(C)(8) because the state has not established the requirements of judicial estoppel. Even if plaintiffs made a wholly inconsistent statement with respect to whether the state's motion under MCR 2.116(C)(8) was before the Supreme Court (the state has certainly not denied that it appealed this Court's ruling on the motion to the Supreme Court), the state has not shown that this assertion was successful.[2] To the contrary, our Supreme

[2] Plaintiffs explain that the comment at issue pertained not to whether *any* (C)(8) motion was pending before the Supreme Court, but to Justice

Court affirmed this Court's decision regarding the state's motion for summary disposition under MCR 2.116(C)(8), albeit in result only.[3]

Therefore, the trial court did not err by denying the state's motion for summary disposition under MCR 2.116(C)(8).

### C. STANDING

Next, the state argues that the trial court erred by failing to decide that plaintiffs lack standing in light of our Supreme Court's decision in *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010) (*LSEA*). The state insists that the intervening change in the law of standing in Michigan under *LSEA* precludes application of the law of the case doctrine and, therefore, allows it to reargue the question of plaintiffs' standing. We disagree.

We review de novo the issues of standing and the application of the law of the case doctrine. *Kasben*, 278 Mich App at 470; *Manuel v Gill*, 481 Mich 637, 642-643; 753 NW2d 48 (2008).

When this case was initially decided, Michigan used the federal tripartite standing test that required a plaintiff to demonstrate the following: (1) an injury in fact that was concrete, particularized, and either actual or imminent, (2) that the injury was fairly

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CORRIGAN's concern about whether these defendants were the proper parties, as compared to "the local funding units that are supposed to fund indigent defense in the counties," to which plaintiffs' counsel indicated that the state had not sought to dismiss the case on this basis.

[3] The state contends that the language of the April 30, 2010 Supreme Court order is far more reflective of what one might expect concerning a motion for summary disposition pursuant to MCR 2.116(C)(10), but clearly, discovery had not yet taken place and the state had never filed a motion for summary disposition under MCR 2.116(C)(10).

traceable (causally linked to) the defendant's conduct, and (3) that the remedy sought would likely redress the plaintiff's injuries. *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280, 294-295; 737 NW2d 447 (2007), overruled by *LSEA*, 487 Mich at 378. However, our Supreme Court in *LSEA* reinstituted Michigan's prior "prudential" standing test, which automatically conferred standing upon any party who has a "legal cause of action," regardless of whether the underlying issue is justiciable. *LSEA*, 487 Mich at 355, 372. The Court's return to the old standard recognized that the purpose of the doctrine was to promote "sincere and vigorous advocacy" between the parties to the dispute. *Id*. at 355 (citation and quotation marks omitted). "Under this approach, a litigant has standing whenever there is a legal cause of action" or the requirements of MCR 2.605 to seek a declaratory judgment are satisfied. *Id*. at 372. If a specific cause of action at law does not exist for the plaintiff, then the following analysis applies:

> A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. [*Id*.]

Although the law of the case doctrine does not necessarily apply when there has been an intervening change in the law, *Sinicropi v Mazurek*, 279 Mich App 455, 464-465; 760 NW2d 520 (2008), our Supreme Court clearly reinstated its original decision affirming this Court's opinion in this case after it decided *LSEA*. Our Supreme Court was surely aware of the change in

the law when it reinstated its prior decision.[4] See *Bennett v Weitz*, 220 Mich App 295, 300; 559 NW2d 354 (1996) ("[O]ur Supreme Court presumably is aware of contrary common-law rules when fashioning court rules."); *In re Archer*, 277 Mich App 71, 84; 744 NW2d 1 (2007) ("[W]e assume that the trial court knew the law . . . ."). The law of case doctrine, therefore, applies because the Supreme Court implicitly decided under *LSEA* the issue of plaintiffs' standing. See, generally, *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000) (explaining that the law of the case doctrine applies to issues decided—explicitly or implicitly—on appeal).

Furthermore, we reject the state's suggestion that we discard *LSEA* and apply the federal standing test because the new prudential test is unworkable and could lead to a violation of the separation of powers. We are "bound by the rule of stare decisis to follow the decisions of our Supreme Court." *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 447; 761 NW2d 846 (2008).

Accordingly, the trial court properly denied the state's motion for summary disposition with respect to standing.

### D. RES JUDICATA

Finally, the state argues that the doctrine of res judicata bars plaintiffs' claims because plaintiffs are attempting to litigate the effectiveness of their indigent

[4] In *LSEA*, the Supreme Court restored Michigan's standing jurisprudence to a limited, prudential doctrine that is less stringent than the prior federal standing test. The state has not shown how the prior rulings on standing were affected by *LSEA*; indeed, it appears that the change in the law concerning standing would favor plaintiffs' case and not the state's.

criminal defense counsel in this subsequent civil action when they could or should have raised the issue of ineffective assistance of counsel during their criminal proceedings. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(7) to determine whether the moving party was entitled to judgment as a matter of law. *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001). "The applicability of the doctrine of res judicata is a question of law that is also reviewed de novo." *Id*.

The doctrine of res judicata precludes relitigation of a claim when it is predicated on the same underlying transaction that was litigated in a prior case. *Id*. at 334. The purpose of res judicata is to prevent inconsistent decisions, conserve judicial resources, and protect vindicated parties from vexatious litigation. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999). Michigan employs a broad approach to the doctrine of res judicata. *Id*.

The elements of res judicata are as follows: (1) the prior action was decided on the merits, (2) the prior decision resulted in a final judgment, (3) both actions involved the same parties or those in privity with the parties, and (4) the issues presented in the subsequent case were or could have been decided in the prior case. *Stoudemire*, 248 Mich App at 334. For purposes of res judicata, parties are in privity with each other when they are " 'so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert.' " *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 421; 733 NW2d 755 (2007), quoting *Adair v Michigan*, 470 Mich 105, 122; 680 NW2d 386 (2004).

We conclude that the state's argument that res judicata bars plaintiffs' claims lacks merit. Res judicata plainly applies to multiple claims arising out of a single transaction. The issues presented in this civil case regarding the state's alleged deprivation of plaintiffs' constitutional rights through a deficient indigent criminal defense system were not and could not have been raised in the plaintiffs' individual criminal prosecutions. See *Stoudemire*, 248 Mich App at 334. The remedy that plaintiffs seek through a class action, i.e., improvements to the indigent criminal defense system, could not have been achieved during plaintiffs' prior criminal proceedings. Without an action such as this, and assuming that plaintiffs' allegations are true, indigent persons who are accused of crimes in Michigan will continue to be subject to inadequate legal representation without remedy unless the representation adversely affects the outcome. Our system of justice requires effective representation, not ineffective but non-outcome-determinative representation. Further, as plaintiffs' proposed class includes indigent people who may not have been convicted of crimes, there has been no final decision on the merits in those cases. See *id*.

Affirmed. We lift the stay previously imposed by this Court and do not retain jurisdiction.

FITZGERALD, J., concurred with BECKERING, J.

WHITBECK, P.J. (*concurring in part and dissenting in part*). I concur in part and respectfully dissent in part. I concur in the majority's holding on class certification, judicial estoppel (with respect to result), and standing (with respect to result under the defendants' first formulation of the issue and fully with respect to the prospect of a panel of this Court overruling a Supreme Court decision).

But although these issues are important, they are actually ancillary to this case. The basic issue is whether the plaintiffs here, acting on behalf of themselves and all others similarly situated, have in their extensive civil complaint for declaratory and injunctive relief set forth claims on which relief can be granted. I do not believe that we can extract a law of the case from a series of confusing and contradictory Supreme Court orders to avoid this basic question. And I continue to believe that the claims plaintiffs set forth are impossible for them to prevail on, even under the most liberal interpretation of those claims and even presuming, as we must, that every single fact alleged is true. Simply put, there are no judicially cognizable claims to be found here. I would therefore reverse and remand for the entry of summary disposition in favor of defendants.

## I. PERTINENT FACTS AND PROCEDURAL HISTORY

### A. OVERVIEW

The majority does an admirably concise job of laying out the background of this case, particularly given that our Court's decision in the original appeal consumed fully 146 single-spaced pages in the *Michigan Appeals Reports* (of which, I readily admit, my dissent took up fully 56 single-spaced pages).[1] Clearly, this is a case of considerable complexity, with numerous important and interwoven issues. And equally clearly, there were considerable disagreements at both our level and the Supreme Court level about the proper approach to these important issues and the proper outcome of the analysis.

Despite, however, the factual and procedural clarity of the majority opinion, there is one procedural aspect

[1] See *Duncan v Michigan*, 284 Mich App 246, 253-399; 774 NW2d 89 (2009) (*Duncan I*).

that justifies amplification: the various decisions of the Supreme Court on the original appeal of defendants, the state of Michigan and the Governor (collectively, "the State"), from this Court's original decision.[2]

The core of the problem is that, throughout the tortured history of this case before the Supreme Court, it is entirely unclear what conceptual approach the Court meant to use. On the one hand, perhaps that Court meant to use the standards for review of an MCR 2.116(C)(10) motion (no genuine issue of material fact and the moving party is entitled to judgment or partial judgment as a matter of law) when considering what was primarily an MCR 2.116(C)(8) motion (failure to state a claim upon which relief can be granted). On the other hand, perhaps the Court meant to hold that a motion under MCR 2.116(C)(8) can be premature if a party files such a motion early in the proceedings before discovery has begun. I apologize in advance for mixing some argumentation into this statement of the procedural history, which normally would involve no argument. But I know of no other way to outline the conceptual problem inherent in the Supreme Court's various orders, a problem that in my view has bedeviled this second appeal from the outset.

### B. THE SUPREME COURT ORDERS

#### 1. THE APRIL 30, 2010 ORDER

Following the State's appeal, on April 30, 2010, the Supreme Court entered the following order:

> Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, *we hereby vacate the trial court's order granting the plaintiffs' motion for class certification and remand this*

[2] *Id*.

*case to the Ingham Circuit Court for consideration of the plaintiffs' motion for class certification in light of this Court's opinion in* Henry v Dow Chemical Co*, 484 Mich 483* [*772 NW2d 301*] *(2009).*

As to the defendants' appeal of the decision on their motion for summary disposition, *we hereby affirm the result only of the Court of Appeals majority for different reasons. This case is at its earliest stages and, based solely on the plaintiffs' pleadings in this case, it is premature to make a decision on the substantive issues. Accordingly, the defendants are not entitled to summary disposition at this time.*[3]

The first paragraph of the April 30, 2010 order is reasonably straightforward: the Supreme Court vacated the trial court's order on class certification and remanded the case to the trial court for it to consider the motion for class certification of the indigent criminal defendants who are the plaintiffs here (the Duncan plaintiffs) in light of *Henry v Dow Chemical Company*.[4]

The second paragraph of the April 30, 2010 order is considerably less straightforward. The first clause of the first sentence ("As to the defendants' appeal of the decision on their motion for summary disposition") obviously concerned the denial of the State's motion for summary disposition. As the majority of this Court noted in its original opinion, the State brought its motion for summary disposition "pursuant to *MCR 2.116(C)(4)*,[5] *(7)*,[6] *and (8).*"[7] Therefore, the Supreme Court in its April 30, 2010 order must have considered the majority's decision in the original appeal in this

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[3] *Duncan v Michigan*, 486 Mich 906 (2010) (*Duncan II*) (emphasis added).

[4] *Henry v Dow Chem Co*, 484 Mich 483; 772 NW2d 301 (2009).

[5] The trial court lacks subject-matter jurisdiction.

[6] The moving party is immune as a matter of law.

[7] *Duncan I*, 284 Mich App at 259 (emphasis added).

Court *under the court rules that the majority enumerated in its original opinion*, primarily MCR 2.116(C)(8). In this regard, I note that there was no reference whatever in the majority's opinion in the original appeal in this Court of the other common basis for summary disposition, MCR 2.116(C)(10).

But the second clause of the first sentence in the Supreme Court's April 30, 2010 order ("we hereby affirm the result only of the Court of Appeals majority for different reasons") adds a twist. Clearly, the Supreme Court approved the majority's decision in the original appeal to uphold the trial court's denial of summary disposition. But it did so for "different reasons." This is a relatively common jurisprudential technique that basically means "right result, wrong reason."[8] And, I believe we can presume, the following two sentences in the Supreme Court's April 30, 2010 order are there to explain the "right" reasons. But do they?

To answer that question, I believe it necessary to take the third sentence apart. Assume that what the Supreme Court really meant in that sentence was: This case is at its earliest stages, and it is premature to make a decision on the substantive issues. There is ample caselaw to the effect that, when considering a motion for summary disposition *under MCR 2.116(C)(10)*, it is generally premature to decide such a motion until there has been an opportunity for full and complete discovery.[9] The basis for this approach is fairly easy to discern:

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[8] See, e.g., *Klooster v City of Charlevoix*, 488 Mich 289, 293-294; 795 NW2d 578 (2011); *In re People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993).

[9] *Davis v Detroit*, 269 Mich App 376, 379; 711 NW2d 462 (2006); see *Goldman v Loubella Extendables*, 91 Mich App 212, 218; 283 NW2d 695 (1979).

it allows the party asserting the claims to flesh out the facts through interrogatories, requests to admit, depositions, and the like.[10]

*But here, there was no motion at the trial court level under MCR 2.116(C)(10).* Therefore, the caselaw applicable to MCR 2.116(C)(10) simply has no bearing. Summary disposition is not premature "when a case can be quickly resolved with a ruling on an issue of law."[11] The trial court appropriately grants summary disposition under MCR 2.116(C)(8) when "the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.' "[12] Viewed in that light, I must with all due respect suggest that the Supreme Court in its April 30, 2010 order applied the wrong standard to a motion decided under MCR 2.116(C)(8).

But there is a second way to parse the sentence. Assume that what the Supreme Court really meant was: Solely on the basis of the plaintiffs' pleadings in this case, it is premature to make a decision on the substantive issues. Frankly, this interpretation is even worse. Motions for summary disposition under MCR 2.116(C)(8) are *always* based solely on a plaintiff's pleadings.[13] Further, all factual allegations are taken as true and any reasonable inferences or conclusions are construed in a light most favorable to the nonmoving party.[14] And courts must deny the motion unless the

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[10] See *Dep't of Social Servs v Aetna Cas & Surety Co*, 177 Mich App 440, 445-446; 443 NW2d 420 (1989).

[11] *Mackey v Dep't of Corrections*, 205 Mich App 330, 333-334; 517 NW2d 303 (1994).

[12] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

[13] *Maiden*, 461 Mich at 119.

[14] *Id*.

claims are so clearly unenforceable *as a matter of law that no factual development can possibly justify recovery.*[15]

MCR 2.116(D)(4) provides that a party may raise the grounds under MCR 2.116(C)(8) "at any time."[16] Thus, a motion under MCR 2.116(C)(8) *cannot* be premature if it is filed after a party serves the complaint. At this stage in the proceedings, the rules deliberately stack the deck in favor of the nonmoving party—usually the plaintiff. And that party cannot further flesh out the case to its benefit. In essence, the nonmoving party's case is factually as good as it ever will get when facing a motion under MCR 2.116(C)(8) because we must take every single fact that the nonmoving party alleged in the complaint as true. Holding a motion under MCR 2.116(C)(8) in abeyance—as the Supreme Court essentially did in the last sentence of the second paragraph of its April 30, 2010 order ("Accordingly, the defendants are not entitled to summary disposition at this time.")—defeats the very purpose of MCR 2.116(C)(8), which is to determine whether a plaintiff's pleadings *alone* set out claims on which a court can grant relief.

In summary, the Supreme Court's April 30, 2010 order puts me in a considerable quandary. I think I know what the first paragraph of that order means: that the Supreme Court vacated the trial court's order on class certification and remanded to the trial court to consider the Duncan plaintiffs' motion for class certification in light of *Henry v Dow Chemical Company*.

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[15] *Id.*

[16] This Court has affirmed in cases in which the trial court granted summary disposition under MCR 2.116(C)(8) even before the moving party filed an answer.

But I must admit that I really do not know what the second paragraph of that order means. There is no reasonable construction of that paragraph that provides the trial court or this Court any guidance concerning how to proceed. Are we to assume that the Supreme Court's "different reasons" meant for us to apply MCR 2.116(C)(10) standards to an MCR 2.116(C)(8) motion? Or are we to assume that the Supreme Court's "different reasons" meant that an MCR 2.116(C)(8) motion really can be premature, despite the contrary language of the court rule? The only thing that I am sure of is that the State's original appeal in the Supreme Court was in front of that Court on the basis of the trial court's denial of the State's motion under MCR 2.116(C)(8), a denial that the majority of the prior panel in this matter specifically affirmed.[17]

2. THE JULY 16, 2010 RECONSIDERATION ORDER

Following the State's motion for reconsideration of the April 30, 2010 order, the Supreme Court entered the following order:

> We vacate our order dated April 30, 2010. On reconsideration, leave to appeal having been granted and the briefs and oral argument of the parties having been considered by the Court, we reverse the June 11, 2009 judgment of the Court of Appeals for the reasons stated in the Court of Appeals dissenting opinion. The defendants are entitled to summary disposition because, as the Court of Appeals dissenting opinion recognized, the plaintiffs' claims are not justiciable. Accordingly, we remand this case to the Ingham Circuit Court for entry of summary disposition in favor of the defendants. The motion for stay is denied.[18]

Justice MARKMAN concurred, stating in part:

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[17] *Duncan I*, 284 Mich App at 255, 343.

[18] *Duncan v Michigan*, 486 Mich 1071, 1071 (2010) (*Duncan III*).

> I concur with the order granting defendant's [sic] motion for reconsideration, vacating this Court's order of April 30, reversing the Court of Appeals, and remanding to the trial court for entry of summary disposition in favor of defendants. In our prior order, we affirmed the result of the Court of Appeals, asserting that because "[t]his case is at its earliest stages and, based solely on the plaintiffs' pleadings in this case, it is premature to make a decision on the substantive issues." This was error for two reasons. *First, as defendants observe, this order vacated the Court of Appeals' opinion without articulating any governing standards. Second, it is not premature to decide this case because the precise issue presented is whether plaintiffs have stated a claim on which relief can be granted, and this, as well as the threshold justiciability issues, can be determined on the face of the complaint.*[19]

Chief Justice MARILYN KELLY dissented. With respect to the second issue that Justice MARKMAN identified—whether the Duncan plaintiffs had stated a claim on which relief could be granted—Chief Justice KELLY stated:

> At this preliminary stage, plaintiffs' claims adduce facts that establish that they have standing, and that their claims are ripe. *Also, they state a claim upon which relief can be granted.* Today's order slams the courthouse door in plaintiffs' face for no good reason.[20]

I agree, as set out earlier, that the precise issue before the Supreme Court was whether the Duncan plaintiffs had stated a claim on which relief could be granted, the standard set out in MCR 2.116(C)(8). Indeed, I note

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[19] *Id*. (MARKMAN, J., concurring) (emphasis added). Justices CORRIGAN and YOUNG joined the statement of Justice MARKMAN. According to Justice CORRIGAN, Justice WEAVER also voted in favor of the July 16, 2010 reconsideration order. *Duncan v Michigan*, 488 Mich 957, 962 n 1 (2010) (*Duncan IV*).

[20] *Duncan III*, 486 Mich at 1075 (emphasis added). Justices CAVANAGH and HATHAWAY joined the statement of Chief Justice KELLY.

that Chief Justice KELLY, joined by Justices CAVANAGH and HATHAWAY, also appeared to agree with that formulation of this issue. But this unanimity, at least as it related to the type of issue before the justices, was not to last long.

3. THE NOVEMBER 30, 2010 RECONSIDERATION ORDER

Following the Duncan plaintiffs' motion for reconsideration of the July 16, 2010 reconsideration order, the Supreme Court entered the following order:

> On order of the Court, the motion for reconsideration of this Court's July 16, 2010, order is considered, and it is granted. We vacate our order dated July 16, 2010, and we reinstate our order in this case dated April 30, 2010, because reconsideration thereof was improperly granted.[21]

This order is clear enough. It reinstates the Supreme Court's April 30, 2010 order, word for word, and with all its conceptual problems concerning the method for reviewing the trial court's denial of the State's motion for summary disposition under MCR 2.116(C)(8). Indeed, the concurring statement of Justice DAVIS made this point crystal clear:

> I agree with Chief Justice KELLY'S dissent from the July 16, 2010, order, stating that the prior motion for reconsideration should have been denied because it added nothing new. To the extent the unanimous April 30, 2010, order was reconsidered because of concerns that it could not be complied with, I have reviewed the record thoroughly and I do not agree with those concerns. Furthermore, if those concerns eventually prove warranted, the trial court should, and is in the best position to, make that evaluation. The trial court has not yet had the opportunity to do so. *As the April 30, 2010, order stated, this case is at its earliest*

[21] *Duncan IV*, 488 Mich at 957.

> *stages and a decision on its substantive merits is premature, but class certification should be reconsidered in light of Henry v Dow Chem Co, 484 Mich 483 (2009).* The original, unanimous order of this Court was correct, and no sufficient basis was presented for this Court to have reconsidered it.[22]

Chief Justice KELLY reiterated the same point, stating:

> The dissenters have yet to raise a single argument of which this Court was unaware when it originally decided this case eight months ago. Indeed, Justice MARKMAN's dissenting statement consists almost entirely of a series of quotations from the Court of Appeals dissenting opinion. *He also claims that it is not premature to make a final decision on this case because the issues involved are fully laid out on the face of the complaint. We rejected that precise argument in our April order*.[23]

Justice MARKMAN, joined by Justices CORRIGAN and YOUNG, dissented on the same grounds that he laid out in his concurrence with the July 16, 2010 reconsideration order.[24] Justice CORRIGAN also separately dissented, joined by Justices YOUNG and MARKMAN, emphasizing the lack of standards contained in the April 30, 2010 order.[25] In this regard, Justice CORRIGAN quoted a recent article illustrating the " 'state of confusion created by the lack of a clear standard to which courts can look when adjudicating these types of systemic reform cases.' "[26] That article also stated:

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[22] *Id*. at 957-958 (DAVIS, J., concurring) (emphasis added). Justice HATHAWAY joined the statement of Justice DAVIS.

[23] *Id*. at 960 (KELLY, C.J., concurring) (emphasis added).

[24] *Id*. at 958-960 (MARKMAN, J., dissenting).

[25] *Id*. at 961-966 (CORRIGAN, J., dissenting).

[26] *Id*. at 964, quoting Chiang, *Indigent defense invigorated: A uniform standard for adjudicating pre-conviction Sixth Amendment claims*, 19 Temp Pol & Civ Rts L R 443, 461 (2010).

> Unfortunately, as evidenced by the murky opinions issued in Hurrel-Harring[27] and Duncan many of the positive decisions lack clarity as to the standard to which plaintiffs are held, decreasing their precedential value for successive litigants and courts.[28]

The standards issue is, of course, vitally important. But central to my point on the procedural status of the issue before the Court, the November 10, 2010 reconsideration order reinstates the exact conceptual problem that was present in the April 30, 2010 order. Justice DAVIS's statement illustrates this problem nicely. By noting that "this case is at its earliest stages," Justice DAVIS appeared to imply that the MCR 2.116(C)(10) standards regarding discovery of material facts apply to an MCR 2.116(C)(8) motion.[29] By noting that "a decision on its substantive merits is premature," Justice DAVIS appeared to imply that a decision on an MCR 2.116(C)(8) motion can, in fact, be premature.[30] Both of these implications confound the settled jurisprudence in Michigan on MCR 2.116(C)(8) motions. The Supreme Court's final reconsideration order in this matter did nothing to alleviate this confusion.

4. THE DECEMBER 29, 2010 RECONSIDERATION ORDER

Following the State's motion for reconsideration of the November 30, 2010 reconsideration order, the Supreme Court issued the following order:

> On order of the Court, the motion for reconsideration of this Court's November 30, 2010, order is considered, and it is denied, because it does not appear that the order was entered erroneously.[31]

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[27] *Hurrell-Harring v State*, 15 NY3d 8; 904 NYS2d 296; 930 NE2d 217 (2010).

[28] Chiang, p 462.

[29] *Duncan IV*, 488 Mich at 958 (DAVIS, J., concurring).

[30] *Id*.

[31] *Duncan v Michigan*, 488 Mich 1011, 1011 (2010) (*Duncan V*).

Justice CORRIGAN dissented, mainly on the lack-of-standards grounds, but did refer to Justice MARKMAN's earlier concurrence with the July 16, 2010 reconsideration order, in which he stated that " 'it is not premature to decide this case because the precise issue presented is whether plaintiffs *have stated a claim on which relief can be granted, and this, as well as the threshold justiciability issues, can be determined on the face of the complaint.*' "[32] There were other concurrences and dissents,[33] but they did not directly address the question of whether the Duncan plaintiffs had stated a claim on which relief could be granted, the standard set out in MCR 2.116(C)(8).

C. CONCLUSION

The proceedings before the Supreme Court in this matter have something of a *Jarndyce v Jarndyce* flavor to them. Although this case has not dragged on for generations, as did the fictional case in Charles Dickens's *Bleak House*, it is approaching its six-year anniversary. And the case could well serve as a ready reference point for the advocates of critical legal theory. To say that the confusing legal posture in which we find ourselves has undertones relating to the philosophical composition of the Supreme Court[34] would be an understatement.

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[32] *Id*. at 1014 n 4, quoting *Duncan III*, 486 Mich at 1071 (emphasis added).

[33] See *Duncan V*, 488 Mich at 1017-1019.

[34] See *Duncan v Michigan*, 488 Mich at 1019, 1022 (2010) (order denying motion to deem earlier release of statements as a final order) (CORRIGAN, J., dissenting) (" 'The majority's lack of restraint is especially troubling given that the electorate already decided on a newly composed Court in the November 2, 2010, election. Undaunted, the majority, now paced by the calendar alone, is content in its attempt to foreclose reconsideration. I believe that the majority's handling of this case belies the way an appellate court should function. Appellate courts should be marked by steadiness and

But we must analyze and decide the case. In undertaking my analysis, I will rely on two points from the various Supreme Court orders that are uncontestable. First, the Supreme Court vacated the trial court's order on class certification and remanded to the trial court to consider the Duncan plaintiffs' motion in light of *Henry v Dow Chemical Company*. Second, the precise issue before the Supreme Court, in all of its orders, was whether the Duncan plaintiffs had stated a claim on which relief could be granted, the standard set out in MCR 2.116(C)(8).

The fog of judicial combat obscures all else. Only Chief Justice KELLY's single sentence in a dissenting statement to the effect that the Duncan plaintiffs have stated a "claim upon which relief can be granted"[35] illuminates the murk with any specificity. And I am completely uncertain about what this solitary, summary sentence means in regard to the law of this case.

## II. CLASS CERTIFICATION

### A. THE SUPREME COURT'S APRIL 30, 2010 ORDER

As I have outlined, the Supreme Court's order of April 30, 2010, vacated the trial court's order on class certification and remanded the case to the trial court to consider the Duncan plaintiffs' motion for class certification in light of *Henry v Dow Chemical Company.*[36]

### B. THE TRIAL COURT'S DECISION

On October 26, 2011, the State filed a renewed motion for summary disposition in the trial court. The

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consistency, not gamesmanship in a race against the clock.' "), quoting *Duncan V*, 488 Mich at 1013 (CORRIGAN, J., dissenting).

[35] *Duncan III*, 486 Mich at 1075 (KELLY, C.J., dissenting); also see *Duncan IV*, 488 Mich App at 960 (KELLY, C.J., concurring).

[36] *Duncan II*, 486 Mich at 906.

trial court denied this motion on December 15, 2011. With respect to class action certification, the trial court also denied the motion, holding that it was premature to decide the class certification issue because discovery was necessary.

### C. THE STATE'S APPEAL

On December 22, 2011, the State filed in this Court a timely interlocutory application for leave to appeal, an emergency motion for stay, and a motion for immediate consideration. On March 1, 2012, this Court granted the State's application and motions, staying further trial court proceedings pending resolution of this appeal or further order of this Court.

On appeal, the State essentially argues two points. First, the State contends that

> when the Michigan Supreme Court remanded the class certification issue for consideration under *Henry v Dow Chemical*, it contemplated review of the *pending* motion for class certification—not a new motion for class certification filed after a year of overbroad discovery. . . . Plaintiffs moved for class certification, with no discovery request, shortly after filing their Complaint. The Supreme Court Order was a mandate for the Circuit Court to consider that pending motion in light of *Henry*. Yet the Circuit Court would not consider the class action issue until discovery was complete.

Second, the State contends that no amount of discovery will change the class certification analysis. No matter what kind of factual record the Duncan plaintiffs develop, the State argues, they cannot demonstrate commonality or superiority, two of the essential elements for class action certification.

### D. STANDARD OF REVIEW

I agree with the majority's statement of the appro-

priate standard of review in this case. Under that standard, the analysis a trial court must undertake in order to determine whether to certify a proposed class may involve making both findings of fact *and* discretionary determinations.[37] Therefore, we review a trial court's factual findings regarding class certification for clear error and the decisions within the trial court's discretion for abuse of discretion.[38] Further, state courts "have broad discretion to determine whether a class will be certified."[39] An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes.[40]

E. THE MAJORITY'S DECISION

With respect to the State's first argument—that the trial court should have considered the State's motion on class action certification with respect to the *pending* class action—the majority contends that the trial court was in fact obeying the Supreme Court's order to consider the class certification question *in light of Henry*. I agree. And I also agree that *Henry* specifically allows a trial court to permit discovery under MCR 3.501(B)(3)(b), which states that "[t]he court may allow the action to be maintained as a class action, may deny the motion, *or may order that a ruling be postponed pending discovery or other preliminary procedures*." (Emphasis added.) Accordingly, the trial court could not have abused and did not abuse its discretion when postponing a ruling on class certification in light of the

[37] *Henry*, 484 Mich at 495-496.

[38] *Id*. at 495.

[39] *Id*. at 503-504.

[40] *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

explicit language in the Supreme Court's April 30, 2010 order, *Henry*, and MCR 3.501(B)(3)(b).

With respect to the State's second argument—that the Duncan plaintiffs cannot demonstrate commonality or superiority, two of the essential elements for class action certification—if this were the issue before us, I would agree with the State, for the reasons that I outlined in my original dissent in *Duncan I*.[41] But this is *not* the issue before us. To repeat, the Supreme Court in its April 30, 2010 order made it clear that the trial court on remand should reexamine the class action aspects this case in light of *Henry*. *Henry* and MCR 3.501(B)(3)(b) allow discovery under these circumstances. As the majority states, a trial court must comply with a directive from an appellate court. Again, the trial court could not have abused and did not abuse its discretion when complying with the Supreme Court's April 30, 2010 order. I therefore concur with the majority on this issue.

I do note that the State asserts that, at the time they filed their complaint, not a single one of the Duncan plaintiffs had gone to trial or otherwise had his or her claims adjudicated. Further, according to the State, not a single one of the Duncan plaintiffs later attempted to have his or her assigned attorney replaced. If this is accurate, it certainly raises the question of whether the Duncan plaintiffs adequately, or even at all, now represent the class they seek to represent—all indigent adult persons who rely or will rely on the counties to provide them with defense services in felony cases[42]—since the Duncan plaintiffs were apparently satisfied with the representation that they received. But the State does not press this argument and, for that reason, I decline to analyze it.

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[41] See *Duncan I*, 284 Mich App at 395 (WHITBECK, J., dissenting).

[42] *Id*. at 391.

III. FAILURE TO STATE A CLAIM

A. THE SUPREME COURT'S ORDERS

To paraphrase my comments on the various Supreme Court orders as they relate to the State's assertion that the Duncan plaintiffs have failed to state a claim on which relief can be granted, I find them supremely confusing. We can be certain that the precise issue before the Supreme Court, in all of its orders, was whether the Duncan plaintiffs stated a claim on which relief could be granted, the standard set out in MCR. 2.116(C)(8). We can be certain that this Court denied the State's motion for summary disposition under MCR 2.116(C)(8). We can be certain that the Supreme Court upheld this denial, but "for different reasons."

However, by analyzing the text of the various orders, we can speculate that one of those different reasons was the notion that since this case was in its "earliest stages," discovery might be necessary. We can also speculate that one of those reasons was the notion that ruling on a MCR 2.116(C)(8) motion would be "premature." We can further observe that applying MCR 2.116(C)(10) standards to a motion under MCR 2.116(C)(8) is inappropriate, the proverbial square peg in a round hole. We can finally observe that holding an MCR 2.116(C)(8) motion to be premature is contrary to settled law concerning those motions, the pounding of a larger square peg into the same round hole. Beyond that, there is little more that we can say and much less of which we can be certain.

B. THE TRIAL COURT'S DECISION

As stated, in October 2011 the State filed a renewed motion for summary disposition in the trial court. The trial court denied this motion in December 2011. With

respect to the State's assertion that the Duncan plaintiffs had failed to state a claim on which relief could be granted, the trial court denied the motion, holding that it had previously held that the Duncan plaintiffs had stated a claim on which relief could be granted and that decision had been affirmed by this Court and the Supreme Court.

C. THE STATE'S APPEAL

On appeal, the State essentially argues three points. The first argument, at the threshold, relates to judicial estoppel. The State asserts that

> [j]udicial estoppel is properly applied here. Plaintiffs' counsel argued to the Michigan Supreme Court during oral argument on April 14, 2010 that "there is no (C)(8) motion before you with respect to — on whether relief can be granted against the Governor." . . . Plaintiffs ultimately prevailed because of, and thus benefitted from, this unequivocal representation, since the Supreme Court's April 30, 2010 Order affirming the denial of summary disposition stated that "it is premature to make a decision on the substantive issues" and effectively treated the earlier motion as fact-based under MCR 2.116(C)(10) rather than pleadings based under MCR 2.116(C)(8). . . . Having successfully benefitted from this representation, Plaintiffs cannot now invoke the authority of the trial court to override its earlier "bargain" with the Michigan Supreme Court and argue that this (C)(8) motion was previously raised and denied.

The State's second argument is that the Duncan plaintiffs have not pleaded facts sufficient to demonstrate a violation of US Const, Am VI and XIV or Const 1963, art 1, §§ 17 and 20 on the basis of a generalized claim of widespread systemic deficiencies in Michigan's indigent defense system. The State goes on to assert that the Duncan plaintiffs have not established the

requisite prejudice to the process in any individual criminal case arising from the alleged systematic deficiency such that the reliability of the ultimate outcome is suspect.

The State's third, and very much related, argument is that allowing the Duncan plaintiffs' preconviction claims to go forward on the facts pleaded requires the presumption that the State has per se so prejudiced indigent criminal defendants that they have been or will be denied their constitutional right to effective counsel and a fair trial.

### D. STANDARD OF REVIEW

We review de novo a trial court's order denying summary disposition under MCR 2.116(8).[43] The trial court properly grants a motion MCR 2.116(C)(8) when "the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.' "[44] A pleader's conclusory statements, when unsupported by facts, are not sufficient to state a cause of action.[45]

### E. THE MAJORITY'S DECISION

#### 1. JUDICIAL ESTOPPEL

The majority holds that, even if the Duncan plaintiffs' counsel made a wholly inconsistent statement, "the state has not shown that such assertion was successful." Frankly, I think this is reading too much into the comment. Whether counsel for the Duncan

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[43] *Maiden*, 461 Mich at 118.

[44] *Id*. at 119, quoting *Wade*, 439 Mich at 163.

[45] *Kramer v Dearborn Hts*, 197 Mich App 723, 725; 496 NW2d 301 (1993).

plaintiffs simply made an incorrect, but extraneous, assertion in the heat of a difficult argument before the Supreme Court or whether the Duncan plaintiffs are correct in their assertion that the State is taking counsel's statement out of context, it would be indeed a miscarriage of justice to decide this important issue on the basis of a single, stray comment. Thus, while I concur in the majority's result, I do not adopt its reasoning as I consider this something of a nonissue.

2. LAW OF THE CASE

The majority asserts that the "only proper question for this Court to address is whether the state's argument [on failure to state a claim] is foreclosed under the law of the case doctrine." The majority goes on to conclude that "the law of the case doctrine applies in this case regarding whether [the Duncan] plaintiffs pleaded a proper cause of action" and asserts that the State has not established a material change of fact or an intervening change in the law that would allow us to avoid the application of the law of the case doctrine "and reconsider the state's motion for summary disposition under MCR 2.116(C)(8)."

I do not agree and I respectfully dissent for three reasons. *First*, bluntly, I do not know what the law of the case in this matter really is, given the mélange of Supreme Court orders with which we must contend. I hope that I have adequately explained my position on this aspect. I have not been quite so bold as to state that, in its ultimate disposition, the Supreme Court was simply wrong on the law. But I do believe that the various orders with their contradictory and conclusionary statements cause sufficient confusion to make the proper application of the law of the case doctrine a decidedly dicey proposition.

*Second*, the Supreme Court effectively held the State's motion under MCR 2.116(C)(8) in abeyance through the last paragraph of its April 30, 2010 order ("Accordingly, the defendants are not entitled to summary disposition *at this time*.").[46] The words "at this time" certainly imply that the State was a liberty to file another motion for summary disposition at a later time, and this is exactly what the State did. Given this rather open invitation, there is considerable doubt in my mind that the law of the case doctrine applies at all.

*Third*, and without parsing the wording of the majority's holding too closely, we are not reconsidering the State's original motion. Rather, we are considering a new motion, in which the State does assert material changes of fact and an intervening change in the law. In my view, these three reasons combined constitute solid grounds on which to decline to apply the law of the case doctrine.

### 3. ACTUAL PREJUDICE

A simple syllogism summarizes the State's argument on this aspect of the case:

**Major Premise:** Prejudice is an essential component of an ineffective assistance of counsel claim at any stage of the proceeding.

**Minor Premise:** The Duncan plaintiffs cannot establish prejudice.

**Conclusion:** Therefore, the Duncan plaintiffs have failed to state a claim on which relief can be granted.

There can be no question that the State's major premise is correct. The Sixth Amendment of the United States Constitution provides that "[i]n all criminal

[46] *Duncan II*, 486 Mich at 906 (emphasis added).

prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[47] The Michigan Constitution contains the same right.[48] In *Gideon v Wainwright*, the United States Supreme Court held that the Sixth Amendment right to counsel was "obligatory" with regard to the states through the operation of the Fourteenth Amendment.[49] And in *Strickland v Washington*, the Court laid out a two-pronged standard for evaluating the effectiveness of counsel.[50] As I said in my original dissent in *Duncan I*:

> [The Court] enunciated a two-part standard for assessing counsel's assistance to a convicted defendant who claims that such assistance was "so defective as to require reversal of a conviction or death sentence . . . ." The first component required a showing that counsel's performance was "deficient"; that is, that counsel made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." The second component required a *showing that the deficient performance prejudiced the defense*; that is, that counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[51]

There can also be no question that the State's minor premise is correct: the Duncan plaintiffs cannot show actual, individualized deficient performance by their counsel. At the time of the filing of the original complaint, according to the State, appointed counsel represented each of the Duncan plaintiffs, criminal charges

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[47] US Const, Am VI.

[48] Const 1963, art 1, § 20.

[49] *Gideon v Wainwright*, 372 US 335, 342; 83 S Ct 792; 9 L Ed 2d 799 (1963).

[50] *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

[51] *Duncan I*, 284 Mich at 354-355 (WHITBECK, J., dissenting) (citations omitted; emphasis added).

were pending because none of the Duncan plaintiffs had gone to trial or otherwise had their cases adjudicated, and none of the Duncan plaintiffs had attempted to have their assigned counsel replaced.[52] Further, according to the State, each of the Duncan plaintiffs has been adjudicated guilty and sentenced. (The record remains silent regarding whether any of these individuals have made postconviction claims of ineffective assistance of counsel.) Thus, the Duncan plaintiffs' claims of prejudice are merely conclusory statements; the Duncan plaintiffs cannot support them with facts.

There is a simple reason that the Duncan plaintiffs did not—and did not even attempt to—show actual, individualized prejudice flowing from assigned counsel's allegedly deficient performance: the Duncan plaintiffs made all of their claims *preconviction*. By the very nature of such claims, it would be impossible for the Duncan plaintiffs to show actual, individualized prejudice because any deficient performance had not yet occurred. If it were that simple, the State's conclusion that the Duncan plaintiffs failed to state claims on which relief could be granted would undoubtedly be correct, and this lawsuit would have been over years ago. But, of course, it is not that simple. As a substitute for actual, individualized prejudice, the Duncan plaintiffs have essentially attempted to show prejudice per se.

#### 4. PREJUDICE PER SE

Another simple syllogism summarizes the State's argument on this aspect of the case:

**Major Premise:** Absent certain blatant instances amounting to the denial of counsel (that is, prejudice

[52] *Id*. at 357-358.

per se), appointed counsel is presumed competent unless a defendant can meet his or her burden to demonstrate a constitutional violation.[53]

**Minor Premise:** The Duncan plaintiffs cannot establish prejudice per se.

**Conclusion:** Therefore, the Duncan plaintiffs have failed to state a claim on which relief can be granted

As the State points out, there are only a limited number of "blatant instances" in which we can presume prejudice. They include:

• when counsel has systemically been denied[54] or is systematically denied at a critical stage;[55]

• when counsel is not present for a postindictment line-up (a critical stage);[56]

• when the right to a pretrial hearing has been denied;[57] and

• when there is joint representation of codefendants and a conflict of interest is apparent.[58]

Otherwise, the United States Supreme Court has held that "[c]laims of ineffective assistance are generally to be resolved through an inquiry into the fairness of a particular prosecution, and not by per se rulemak-

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[53] *United States v Cronic*, 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

[54] See *Coleman v Alabama*, 399 US 1, 7; 90 S Ct 1999; 26 L Ed 2d 387 (1970), citing *Powell v Alabama*, 287 US 45, 69; 53 S Ct 55; 77 L Ed 158 (1932).

[55] *Cronic*, 466 US at 659.

[56] *United States v Wade*, 388 US 218, 236-237; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

[57] *Pugh v Rainwater*, 483 F2d 778, 787 (CA 5, 1973), rev'd in part on other grounds by *Gerstein v Pugh*, 420 US 103; 95 S Ct 854; 43 L Ed 2d 54 (1975).

[58] *Holloway v Arkansas*, 435 US 475, 488-489; 98 S Ct 1173; 55 L Ed 2d 426 (1978).

ing."[59] Since none of the Duncan plaintiffs' claims fit into the specific categories that the Court enumerated as constituting prejudice per se, the question becomes whether there are other grounds on which to recognize those preconviction claims. I conclude there are not.

As the State points out, neither the United States Supreme Court nor the Michigan Supreme Court has recognized the type of preconviction claims that the Duncan plaintiffs assert here, and for good reason. And as I pointed out in my original dissent in *Duncan I*,[60] and as Justice MARKMAN summarized in a mercifully concise fashion in *Duncan III*,[61] there are a variety of factors—including standing, ripeness, causation, the type of claim the Duncan plaintiffs assert, the type of relief the Duncan plaintiffs seek, and, ultimately, justiciability—that lead, inexorably, to the conclusion that the Duncan plaintiffs have not stated a claim on which relief can be granted. Simply put, there are no grounds on which to recognize their preconviction claims, as they are entirely speculative in nature.

The causation factor alone illustrates the intractable problems that the Duncan plaintiffs face with their preconviction claims. As I said in my dissent in *Duncan I*:

> The majority states that throughout its opinion it has indicated that the Duncan plaintiffs will have to establish a "causal connection between the deficient performance and the indigent defense systems being employed." That is simply not the causal connection that is relevant in this case. The Duncan plaintiffs have sued the state and the

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[59] *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F2d 637, 647 (CA 4, 1988), citing *Cronic*, 466 US 648, and *Strickland*, 466 US 668.

[60] *Duncan I*, 284 Mich App at 343-399 (WHITBECK, J., dissenting).

[61] *Duncan III*, 486 Mich at 1071-1073 (MARKMAN, J., concurring).

> Governor. Therefore, the relevant causal connection must be between the alleged inaction of the state and the Governor and the alleged deficient performance at the local level.
>
> Now, as if repeating a mantra, the Duncan plaintiffs repeatedly aver that there is such a causal connection. But there is not a single fact that they allege in their complaint that supports their generalized assertions that the alleged inaction of the state and the Governor has *caused* the deficient performance that the Duncan plaintiffs outline. Moreover, simply repeating the same words again and again does not change their character.
>
> Undoubtedly, the complaint alleges causation. But it does not allege the *necessary* causation. Unsupported generalized allegations are just that, unsupported and generalized. With all due respect to the Duncan plaintiffs and the majority, there is no way it can possibly be proven that the failure of the state and the Governor to do an undefined something specifically *caused* the deficiencies they allege. Intuitively, one might guess that the something is correlated with the alleged deficiencies, even though that something remains undefined beyond mere generalized assertions of inaction. But correlation is not causation, and a hunch is not a basis upon which a court can grant declaratory and injunctive relief.[62]

### F. CONCLUSION

The quoted statement is as true today as it was in 2009. The majority here fails to address the central issue in this case: whether the Duncan plaintiffs have stated a claim on which relief can be granted. While I agree that judicial estoppel does not apply, I also conclude that the law of the case doctrine does not bar our consideration of this central issue. And I further conclude that the Duncan plaintiffs cannot establish that they were prejudiced, whether

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[62] *Duncan I*, 284 Mich App at 372-373 (WHITBECK, J., dissenting) (citations omitted).

through demonstrating actual prejudice or by adequately supporting the substitution of a presumption of prejudice per se for the actual prejudice requirement inherent in *Strickland*. I would reverse the trial court on this issue and remand for the entry of summary disposition in favor of the State.

## IV. STANDING

### A. THE SUPREME COURT'S ORDERS

The Supreme Court's orders do not address the subject of standing.

### B. THE TRIAL COURT'S DECISION

As stated, in October 2011 the State filed a renewed motion for summary disposition in the trial court. The trial court denied this motion in December 2011. With respect to the State's assertion that the Duncan plaintiffs lacked standing, the trial court ruled that it had previously ruled that the Duncan plaintiffs had standing.

### C. THE STATE'S APPEAL

On appeal, the State argues two points. First, the State asserts that the Duncan plaintiffs' claims are not justiciable because plaintiffs lack standing under Michigan's new standard contained in *Lansing Schools Education Association v Lansing Board of Education*.[63] Second, and alternatively, the State asserts that the *Lansing Schools* standard is unworkable and should be overturned because it allows a litigant to bring a claim without demonstrating an actual injury.

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[63] *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010).

D. STANDARD OF REVIEW

Whether a party has standing is a question of law that we review novo.[64]

E. THE MAJORITY'S DECISION

Noting that while the law of the case doctrine does not necessarily apply when there has been an intervening change in the law, the majority reasons that "our Supreme Court clearly reinstated its original decision affirming this Court's opinion in this case *after* it decided" *Lansing Schools*.[65] Chronologically, this is certainly true. But I am not sure that it decides the issue as the State has postured it.

In this regard, I repeat my conclusion, stated at length in *Duncan I*,[66] that because of their peculiar preconviction status in the case, the Duncan plaintiffs lacked standing.[67] I remain convinced that, for the same reason, the Duncan plaintiffs continue to lack standing under even the more relaxed standards contained in *Lansing Schools*. But the State's position appears to be that since the law has changed—even though the change, as the majority notes, has made it easier to show standing—the trial court erred when it declined to revisit the issue. Essentially, the State has wrong-footed itself; it can hardly be considered error when a trial court does not rehash a previous conclusion in light of a new standard that would actually make it easier to reach the same result. Thus, I concur in the majority's result, although not for the same reasons that it articulates. In any event, if I am correct that the Duncan

[64] *Manuel v Gill*, 481 Mich 637, 642; 753 NW2d 48 (2008).

[65] Emphasis added.

[66] *Duncan I*, 284 Mich at 365- 371 (WHITBECK, J., dissenting).

[67] *Id*. at 371.

plaintiffs have not stated a claim on which relief can be granted, the issue need not be decided.

As for the State's second argument to the effect that we should somehow overrule the Supreme Court's decision in *Lansing Schools*, I fully concur in the reasoning and the result that the majority sets out. While I recognize that the State would like to have the ruling in *Lansing Schools* set aside, it is almost risible to suggest that this Court do so. Panels of this Court do not overrule decisions of the Supreme Court. To suggest otherwise is to disregard the judiciary's hierarchical system and the very concept of stare decisis. And, again, if I am correct that the Duncan plaintiffs have not stated a claim on which relief can be granted, the issue need not be decided.

### V. RES JUDICATA

#### A. THE SUPREME COURT'S ORDERS

The Supreme Court's orders do not address the subject of res judicata.

#### B. THE TRIAL COURT'S DECISION

As stated, in October 2011 the State filed a renewed motion for summary disposition in the trial court. The trial court denied this motion in December 2011. With respect to the State's assertion that res judicata controlled, the trial court ruled that res judicata did not bar the action.

#### C. THE STATE'S APPEAL

The State argues that the doctrine of res judicata prevents the problem of multiple suits litigating the same cause of action. "The doctrine bars a second,

subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first."[68]

The State contends the Michigan Supreme Court takes a broad approach to the doctrine of res judicata, having held that it "bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not."[69] The State concludes that all three prongs of the test for the application of res judicata have been met here.

### D. STANDARD OF REVIEW

As the majority states, we review de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(7) to determine whether the moving party was entitled to judgment as a matter of law.[70] "The applicability of the doctrine of res judicata is a question of law that is also reviewed de novo."[71]

### E. THE MAJORITY'S DECISION

The majority holds that

> [t]he issues presented in this civil case regarding the state's alleged deprivation of plaintiffs' constitutional rights through a deficient indigent criminal defense system were not and could not have been raised in the plaintiffs'

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[68] *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004); see also *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001).

[69] See *Adair*, 470 Mich at 121, citing *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999); see also *Sewell*, 463 Mich at 575.

[70] *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001).

[71] *Id*.

> individual criminal prosecutions. See *Stoudemire*, 248 Mich App at 334. The remedy that plaintiffs seek via a class action, i.e., improvements to the indigent criminal defense system, could not have been achieved during plaintiffs' prior criminal proceedings. . . . Further, as plaintiffs' proposed class includes indigent people who may not have been convicted of crimes, there has been no final decision on the merits in those cases. See *id*.

Obviously, the majority is here relying on the third prong of the res judicata test: that the issues presented in the subsequent case "were or *could have been decided* in the prior case." (Emphasis added.) But it *is* possible that the issue of deficiencies in the indigent criminal defense system could have been raised and decided in the individual prosecutions of the individual Duncan plaintiffs.

After all, broad issues of lack of representation and lack of effective representation were raised and decided in both *Gideon* and *Strickland*. Not every request for major changes in the law need be decided on a class action basis through the exercise of declaratory and injunctive relief; in fact, most are not. And only if the class action route is the *exclusive* route by which to pursue those changes must the proposed class include persons not yet convicted of crimes, for whom there have been no decisions on the merits, as is the case here. Therefore, I dissent on this point, but I again note that if I am correct that the Duncan plaintiffs have failed to state a claim on which relief can be granted, then we need not reach this issue.

## VI. CONCLUSION

The State's appeal in this case raises a number of important issues, some new and some the same or virtually the same as it raised in its initial appeal in this Court and before the Supreme Court. Sorting these

issues out is a considerable job in and of itself, and the majority has proceeded carefully and methodically, issue by issue, to do just that. For these reasons and as I have set out, I concur in the majority's holdings with respect to class certification, judicial estoppel (with respect to result), and standing (with respect to result under the State's first formulation of the issue and fully with respect to our overruling *Lansing Schools*).

But I profoundly disagree with the majority's conclusion that the "only proper question for this Court to address" is whether the State's argument on the failure of the Duncan plaintiffs to state a claim on which relief can be granted is "foreclosed under the law of the case doctrine." To the extent that there is a law of the case in this matter growing out of the Supreme Court's various orders—and I doubt that there really is—it is so confusing and contradictory as to defy application. Under those circumstance, as I have outlined, I would hold that the Duncan plaintiffs have, even when accepting each of the facts that they assert as true, failed to state a claim on which a court—any court—can grant relief.

And with respect to relief, an additional comment is in order. As I stated in my original dissent in *Duncan I*,[72] there is no question that it is the ultimate responsibility of the judiciary "to say what the law is."[73] But those seeking judicial intervention must first establish that "their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable."[74] And then, " 'a particularized showing of irreparable harm . . . is . . . an indispensable requirement to obtain a preliminary injunc-

[72] *Duncan I*, 284 Mich at 385 (WHITBECK, J., dissenting).

[73] *Marbury v Madison*, 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803).

[74] *Raines v Byrd*, 521 US 811, 820; 117 S Ct 2312; 138 L Ed 2d 849 (1997).

tion.' "[75] "The mere apprehension of future injury or damage cannot be the basis for injunctive relief."[76]

Adding to these stringent requirements is the concept of judicial restraint: that certain modesty with which we should contemplate intervening in public policy matters that more properly belong before the legislative and executive branches. The Duncan plaintiffs seek sweeping declaratory and injunctive relief. But the Supreme Court has recognized that normally, when dealing with the legislative and executive branches, declaratory relief is sufficient. In *Straus v Governor*, the Court said:

> [D]eclaratory relief normally will suffice to induce the legislative and executive branches, the principal members of which have taken oaths of fealty to the constitution identical to that taken by the judiciary, Const 1963, art 11, § 1, to conform their actions to constitutional requirements or confine them within constitutional limits. Only when declaratory relief has failed should the courts even begin to consider additional forms of relief in these situations.[77]

It is with that sense of judicial restraint and modesty—a recognition of the limits of judicial power, the historical efficacy of case-by-case adjudication, and the proper regard for those branches whose primarily responsibility it is to make public policy—that I suggest we should consider the issues involved in this case. Under this approach, we should now end the Duncan plaintiffs' long crusade.

I would reverse and remand this case for the entry of summary disposition in favor of the State.

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[75] *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 9; 753 NW2d 595 (2008), quoting *Mich Coalition of State Employee Unions v Civil Serv Comm*, 465 Mich 212, 225-226; 634 NW2d 692 (2001).

[76] *Pontiac Fire Fighters*, 482 Mich at 9.

[77] *Straus v Governor*, 459 Mich 526, 532; 592 NW2d 53 (1999) (quotation marks and citations omitted).

HUNTER v SISCO

Docket No. 306018. Submitted November 14, 2012, at Detroit. Decided April 2, 2013, at 9:10 a.m. Leave to appeal sought.

Harold Hunter, Jr., brought an action in the Genesee Circuit Court against David Sisco, Auto Club Insurance Association, and the city of Flint Transportation Department, seeking damages for injuries, including shock, emotional damage, pain, and suffering, allegedly sustained in an automobile accident that occurred when a dump truck owned by the city of Flint Transportation Department (hereafter "defendant") and driven by Sisco, defendant's employee, sideswiped plaintiff's vehicle, which was insured under an automobile insurance policy issued by Auto Club. Defendant sought summary disposition, arguing that, under the motor vehicle exception to governmental immunity, MCL 691.1405, plaintiff may only recover for bodily injury and property damage and that Auto Club is liable for plaintiff's economic damages, including medical expenses. Defendant alleged that plaintiff's claims for emotional damages are not contemplated in the motor vehicle exception and that it is not liable for any damages because plaintiff failed to establish a serious impairment of body function. Plaintiff responded by noting that he was seeking damages for bodily injury and emotional damages, asserting that he had sustained an objectively manifested injury to his back and that the evidence showed that the injury affected his ability to live his normal life because it prevented him from working and participating in his prior recreational activities. The court, Joseph J. Farah, J., denied defendant's motion on the bases that genuine issues of material fact remained regarding whether the accident caused plaintiff's injuries and whether plaintiff suffered a serious impairment of a body function. The court additionally ruled that, should plaintiff prove his claim, plaintiff is entitled to recover damages from defendant for pain and suffering because the limitation to recovery for "bodily injury" in MCL 691.1405 embraces and encompasses pain and suffering associated with the bodily injury. Defendant appealed.

The Court of Appeals *held*:

1. A governmental agency may only be liable for bodily injury and property damage under the motor vehicle exception to governmental immunity. The phrase "bodily injury" simply means a physical or corporeal injury to the body and does not include pain and suffering, shock, emotional damage, or stress. The motor vehicle exception does not state or suggest that governmental agencies are liable for "any" damages once a plaintiff makes a threshold showing of bodily injury or property damage. Nonphysical injuries that lack any physical manifestations do not constitute a bodily injury. The trial court erred by holding that bodily injury encompass emotional damages of the kind claimed by plaintiff.

2. Plaintiff raised questions of fact regarding whether the accident caused an objectively manifested impairment and, if so, whether the impairment was to an important body function and whether it affected his ability to lead a normal life. The trial court correctly denied summary disposition on the basis that genuine issues of material fact remained in dispute. The trial court must hold an evidentiary hearing to resolve those issues.

Affirmed in part, reversed in part, and remanded.

1. GOVERNMENTAL IMMUNITY — MOTOR VEHICLE EXCEPTION — BODILY INJURY — PROPERTY DAMAGE.

A governmental agency may be liable under the motor vehicle exception to governmental immunity only for bodily injury and property damage; immunity is waived under the "bodily injury" provision of the exception only for claims of physical or corporeal injury to the body and not with regard to claims for pain and suffering, emotional shock, or stress; nonphysical injuries that lack any physical manifestations do not constitute a bodily injury (MCL 691.1405).

2. GOVERNMENTAL IMMUNITY — MOTOR VEHICLE EXCEPTION — EXCESS DAMAGES — SERIOUS IMPAIRMENT OF BODY FUNCTION.

A plaintiff making a tort claim for excess damages under the motor vehicle exception to governmental immunity must, as a threshold, show a serious impairment of body function as set forth in MCL 500.3135; a plaintiff, to establish a serious impairment of a body function, must show an objectively manifested impairment (observable or perceivable from actual symptoms or conditions) of an important body function (a body function of value, significance, or consequence to the injured person) that affects the person's general ability to lead a normal life (influences some of the person's capacity to live in his or her normal manner of living) (MCL 691.1405).

*Allan Falk, P.C.* (by *Allan Falk*), and *Weiner & Associates, P.C.* (by *Cyril V. Weiner*), for Harold Hunter, Jr.

*John Postulka*, Assistant City Attorney, for the city of Flint Transportation Department.

Before: SAWYER, P.J., and SAAD and METER, JJ.

SAAD, J. The city of Flint Transportation Department (hereafter "defendant") appeals the trial court's denial of its motion for summary disposition. For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

## I. FACTS AND PROCEEDINGS

This case arises out of an automobile accident that occurred July 20, 2009. Plaintiff's vehicle was sideswiped by a dump truck owned by defendant and driven by defendant's employee, defendant David Sisco. Plaintiff testified that he and Sisco were traveling at approximately 10 to 15 miles an hour when the accident occurred. At the time, plaintiff was covered under an auto insurance policy issued by defendant Auto Club Insurance Association (ACIA). A police officer determined that Sisco was at fault for the accident. Plaintiff asked Sisco to call an ambulance and medical personnel subsequently examined plaintiff and then left the scene. Thereafter, plaintiff's mother drove plaintiff to Hurley Medical Center. The hospital discharged plaintiff the same day with a final diagnosis of lower back pain and a doctor prescribed ibuprofen and a muscle relaxant for him. The discharge instructions directed plaintiff to increase his activity "as tolerated" and to follow up with his primary-care doctor.

Plaintiff did not seek further treatment until October 10, 2009. Plaintiff testified that his back pain made it more and more difficult to get out of bed in the morning so, on the advice of a friend, he went to the Mundy Pain Clinic for physical therapy. Thereafter, on February 12, 2010, plaintiff went to the clinic, complaining of neck and back pain, spasms, and weakness. He underwent a nerve-conduction study and an electromyography (EMG) test and the results were normal. However, the doctor noted that plaintiff appeared to have bilateral sacroiliac joint inflammation.

Later, on March 13, 2010, an MRI showed no injury to plaintiff's sacroiliac joints, but showed a herniated disc in plaintiff's lumbar spine. An EMG performed on April 15, 2010, showed that plaintiff had a pinched nerve at the same place on his lumbar spine. Plaintiff alleges that, because of the accident, he was unable to work at his job as a custodian at a barber shop. He further claims that he was unable to perform chores around the house, he could not sit or stand for long periods, he was unable drive, bend, or lift more than 5 to 10 pounds, and he could no longer play softball or basketball with his son and the young people he mentored.

Defendant filed a motion for summary disposition and argued that, under the motor vehicle exception to governmental immunity, MCL 691.1405, plaintiff may only recover for bodily injury and property damage and that plaintiff's no-fault insurer, ACIA, is liable for his economic damages, including medical expenses. Defendant maintained that plaintiff's claims for emotional damages are not contemplated in the motor vehicle exception. Moreover, defendant argued that it is not liable for any damages because plaintiff failed to establish a serious impairment of body function. In response,

plaintiff argued that he is seeking bodily injury and emotional damages from defendant and is legally entitled to both. Plaintiff asserted that he sustained an objectively manifested injury to his back and that the evidence shows that the injury affected his ability to live his normal life because it prevented him from working and participating in his prior recreational activities.

The trial court denied defendant's motion for summary disposition on the ground that genuine issues of material fact remained in dispute about whether the auto accident caused plaintiff's injuries and whether plaintiff suffered a serious impairment of a body function. The court also ruled that, should he prove his claim, plaintiff is entitled to recover damages for pain and suffering from defendant because the limitation to recovery for bodily injury "embraces and encompasses pain and suffering associated with the bodily injury . . . ." Defendant appeals that ruling.

## II. DISCUSSION

### A. STANDARDS OF REVIEW AND APPLICABLE LAW

Defendant filed its motion for summary disposition pursuant to MCR 2.116(C)(7) and (10). "A trial court's ruling on a motion for summary disposition is reviewed de novo." *Burise v City of Pontiac*, 282 Mich App 646, 650; 766 NW2d 311 (2009). "A trial court properly grants summary disposition under MCR 2.116(C)(7) when a claim is barred because of immunity granted by law." *Petipren v Jaskowski*, 294 Mich App 419, 424; 812 NW2d 17 (2011). "When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a court must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine

issue of material fact exists." *Dextrom v Wexford Co*, 287 Mich App 406, 415-416; 789 NW2d 211 (2010). Further, "[t]he applicability of governmental immunity and the statutory exceptions to immunity are also reviewed de novo on appeal." *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012).[1]

Under the governmental tort liability act (GTLA), MCL 691.1407(1), "[e]xcept as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." As this Court explained in *Petipren*, 294 Mich App at 425:

> "The existence and scope of governmental immunity was solely a creation of the courts until the Legislature enacted the GTLA in 1964, which codified several exceptions to governmental immunity that permit a plaintiff to pursue a claim against a governmental agency." *Duffy v Dep't of Natural Resources*, 490 Mich 198, 204; 805 NW2d 399 (2011). The statutory exceptions must be narrowly construed. *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003). A plaintiff bringing suit

[1] We reject plaintiff's claim that this Court lacks jurisdiction to decide this appeal. As this Court recently stated in *Seldon v Suburban Mobility Auth for Regional Transp*, 297 Mich App 427, 436; 824 NW2d 318 (2012), under MCR 7.203(A) and MCR 7.202(6)(a)(v), "this Court has jurisdiction to decide an appeal of right from an order denying governmental immunity under MCR 2.116(C)(7) or 'denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity,' but the appeal is limited to 'the portion of the order with respect to which there is an appeal of right.' " However, the *Seldon* Court also recognized that "[i]n *Walsh v Taylor*, 263 Mich App 618, 625; 689 NW2d 506 (2004), this Court interpreted the provisions and opined that 'regardless of the specific basis of the trial court's ruling on a motion for summary disposition, whenever the effect is to deny a defendant's claim of immunity, the trial court's decision is, in fact, "an order denying governmental immunity," ' and is reviewable under MCR 7.203(A) and MCR 7.202(6)(a)(v)." *Sheldon*, 297 Mich App at 436. Both the issues raised by defendant on appeal relate to whether it is immune from suit, and this Court has jurisdiction to review both issues.

> against the government must plead in avoidance of governmental immunity. *Odom* [*v Wayne Co*, 482 Mich 459, 478-479; 760 NW2d 217 (2008)].

This case requires our interpretation of the motor vehicle exception to governmental immunity, MCL 691.1405, which provides: "Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . ." As our Supreme Court explained in *Lash v Traverse City*, 479 Mich 180, 187; 735 NW2d 628 (2007):

> When interpreting a statute, our primary obligation is to ascertain and effectuate the intent of the Legislature. To do so, we begin with the language of the statute, ascertaining the intent that may reasonably be inferred from its language. When the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted.

It is undisputed that David Sisco worked for defendant and that the trial court ruled that he negligently operated the dump truck in a manner that led to the collision with plaintiff's vehicle, though the parties dispute whether the collision caused plaintiff's pinched nerve and herniated disc.

### B. EMOTIONAL INJURIES

In his complaint, plaintiff claimed he sustained injuries from "shock and emotional damage" as well as pain and suffering. Plaintiff also testified that he felt stress and disappointment that he cannot provide for his son as he had in the past and could not participate in certain activities he did before his injury. As discussed below, we hold that such damages

are precluded under MCL 691.1405 because a governmental agency may only be liable for "bodily injury" and "property damage."

The trial court ruled that "bodily injury" encompasses emotional damages of the kind claimed by plaintiff. Thus, at issue is the scope and meaning of "bodily injury" in MCL 691.1405. As our Supreme Court explained in *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 84; 746 NW2d 847 (2008): "This [statute] is clear: it imposes liability for "bodily injury" and "property damage" resulting from a governmental employee's negligent operation of a government-owned motor vehicle. The waiver of immunity is limited to two categories of damage: bodily injury and property damage." In *Wesche*, our Supreme Court considered the meaning of "bodily injury" for purposes of the motor vehicle exception and opined:

> Although the GTLA does not define "bodily injury," the term is not difficult to understand. When considering the meaning of a nonlegal word or phrase that is not defined in a statute, resort to a lay dictionary is appropriate. *Horace v City of Pontiac*, 456 Mich 744, 756; 575 NW2d 762 (1998). The word "bodily" means "of or pertaining to the body" or "corporeal or material, as contrasted with spiritual or mental." *Random House Webster's College Dictionary* (2000). The word "injury" refers to "harm or damage done or sustained, [especially] bodily harm." *Id*. Thus, "bodily injury" simply means a physical or corporeal injury to the body. [*Wesche*, 480 Mich at 84-85.]

Thus, under *Wesche*, defendant's immunity is waived only for claims of "physical or corporeal injury to the body." *Id*. at 85. And the Court in *Wesche* made clear that the limitation on the waiver of immunity with regard to "bodily injury" pertains even if a plaintiff seeks damages for other injuries after also meeting the requirement of proving a "bodily injury." As the Court explained, MCL 691.1405 limits recovery to bodily in-

jury or property damage and "does not state or suggest that governmental agencies are liable for *any* damages once a plaintiff makes a threshold showing of bodily injury or property damage." *Wesche*, 480 Mich at 85-86. Had the Legislature intended to simply create a threshold that, once established, would permit noneconomic or emotional damages, it would have done so explicitly and, in the motor vehicle exception, it did not. *Id*. at 86. In so holding, the Court in *Wesche* rejected the rationale of *Kik v Sbraccia*, 268 Mich App 690, 709-710; 708 NW2d 766 (2005), vacated in part 268 Mich App 801 (2005), that, in the motor vehicle exception, the Legislature intended to permit damages for something more than physical harm, including pain and suffering damages, as long as a threshold of "bodily injury" was met. *Wesche*, 480 Mich at 85-86.

The holding in *Wesche* also comports with caselaw and our rules of statutory construction. Indeed, our jurisprudence interpreting and applying the GTLA instructs that no expansive reading of the motor vehicle exception is appropriate or permitted. "The immunity from tort liability provided by the governmental immunity act is expressed in the broadest possible language; it extends to all governmental agencies and applies to all tort liability when governmental agencies are engaged in the exercise or discharge of governmental functions." *McLean v McElhaney*, 289 Mich App 592, 598; 798 NW2d 29 (2010), citing *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156; 615 NW2d 702 (2000). Thus, as recognized by the Court in *Wesche*, the immunity conferred to defendant here is broad. In contrast, because the Legislature clearly intended to limit the exposure of governmental entities to tort litigation, the small number of exceptions to that immunity must be read and construed narrowly, as in *Wesche*. *Nawrocki*, 463 Mich at 149.

As discussed, "[t]he primary objective in construing a statute is to ascertain and give effect to the Legislature's intent." *McLean*, 289 Mich App at 597-598. MCL 8.3 provides that, "[i]n the construction of the statutes of this state, the rules stated in [MCL 8.3a to MCL 8.3w] shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature." Accordingly, we are bound to follow the Legislature's further directive that "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." MCL 8.3a.

Again, if given, a definition in a statute controls, and "bodily injury" is undefined in MCL 691.1405. *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007). Unquestionably, "bodily injury" could be considered a term of art that has acquired a unique legal meaning in our jurisprudence and, in such cases, "[i]t is presumed that the Legislature in using a term which has a well-defined meaning at the time of a legislative enactment intended that meaning to be employed." *Paprocki v Jackson Co Clerk*, 142 Mich App 785, 791; 371 NW2d 450 (1985). The meaning of "bodily injury," and the differences among claims for "bodily injury," "personal injury," and emotional or psychological injuries are manifest in our caselaw. In criminal cases, our courts have clearly defined "bodily injury" to mean physical damage to a person's body. *People v Cathey*, 261 Mich App 506, 514; 681 NW2d 661 (2004), citing MCL 777.33(1). Our courts have interpreted coverage for "bodily injury" in insurance policies as not encompassing those for mental suffering unless there exists some physical manifestation of the mental suffering, which is

clearly lacking here. See *State Farm Fire & Cas Co v Basham*, 206 Mich App 240, 243; 520 NW2d 713 (1994), citing *Nat'l Ben Franklin Ins Co of Mich v Harris*, 161 Mich App 86, 90; 409 NW2d 733 (1987), and *Farm Bureau Mut Ins Co of Mich v Hoag*, 136 Mich App 326, 332, 335; 356 NW2d 630 (1984). In *State Farm Mut Auto Ins Co v Descheemaeker*, 178 Mich App 729; 444 NW2d 153 (1989), this Court explained that, when a policy defines "bodily injury" as " 'bodily injury to a person and sickness, disease or death which results from it,' " it is "unambiguous and has been understood as contemplating 'actual physical harm or damage to a human body.' " *Id*. at 732, quoting *Hoag*, 136 Mich App at 334-335. "Nonphysical injuries, such as humiliation and mental anguish, that lack any physical manifestations do not constitute a 'bodily injury.' *Hoag*, [136 Mich App at 335; *Harris*, 161 Mich App at] 89. Therefore, it follows that other nonphysical injuries, such as a loss of consortium, society and companionship, which lack any physical manifestations, are also not bodily injuries." *State Farm*, 178 Mich App at 732.

In considering the meaning of an undefined term of art it is also appropriate to consult a legal dictionary for guidance and to consider its meaning as developed at common law. *People v Flick*, 487 Mich 1, 11; 790 NW2d 295 (2010). As the Court recognized in *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 56; 760 NW2d 811 (2008), "Black's Law Dictionary (7th ed), p 789 . . . defines 'bodily injury' as '[p]hysical damage to a person's body.' " See also Black's Law Dictionary (9th ed), p 856.[2] In contrast, Black's defines "personal injury" to

[2] However, plaintiff's reliance on *Allen* to support his claimed damages is misplaced. In *Allen*, the Court considered whether the plaintiff suffered a brain injury in the vehicle accident and whether the brain injury constituted a "bodily injury" under MCL 691.1405. *Allen*, 281 Mich App at 50-51. Here, while plaintiff presented evidence that he

include "mental suffering," which is also in keeping with our caselaw. *Id*. at 857. As set forth in *Alfieri v Bertorelli*, 295 Mich App 189, 198; 813 NW2d 772 (2012), "the modern definition of a 'personal injury' [refers] to any invasion of a personal right, not only bodily injuries. Black's Law Dictionary (9th ed)." Further, "[i]n the tort context, an 'injury' is generally understood to mean '[a]ny wrong or damage done to another, either in his person, rights, reputation, or property.' Black's Law Dictionary (6th ed), p 785." *Karpinski v St John Hospital-Macomb Ctr Corp*, 238 Mich App 539, 543; 606 NW2d 45 (1999).

Thus, it is clear from myriad cases and lay and legal resources that, if the Legislature wanted to permit plaintiffs to recover within the motor vehicle exception damages for pain and suffering or emotional shock or stress, it could have done so by providing for "personal injury" or emotional damages in the statute. See, for example MCL 600.6301; *Potter v McLeary*, 484 Mich 397, 422 n 30; 774 NW2d 1 (2009). Instead, in drafting MCL 691.1405, the Legislature chose to specifically limit the waiver of immunity to bodily injury and property damage. Thus, the *Wesche* definition of "bodily injury" is clearly correct, regardless whether we view "bodily injury" as a legal term of art or consider its commonly understood meaning. Because "bodily injury" encompasses only "a physical or corporeal injury to the body," *Wesche*, 480 Mich at 85, the trial court erroneously ruled that plaintiff may recover damages for pain and suffering and "shock and emotional dam-

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sustained a "bodily injury" to his back, his claim for emotional injuries is not one for which he may recover for the reasons set forth in *Wesche*. Unlike in *Allen*, here, there is no evidence that plaintiff had an objectively manifested brain injury that might have caused his claimed emotional injuries. *Id*. at 59-60.

age." Such damages simply do not constitute physical injury to the body and do not fall within the motor vehicle exception.

C. SERIOUS IMPAIRMENT THRESHOLD

A plaintiff making a tort claim for excess damages under the motor vehicle exception must, as a threshold, show a serious impairment of body function as set forth in the no-fault act, MCL 500.3135. *Hardy v Oakland Co*, 461 Mich 561, 566; 607 NW2d 718 (2000). Here, the trial court ruled that plaintiff raised a genuine issue of material fact about whether he sustained a threshold injury pursuant to *McCormick v Carrier*, 487 Mich 180, 215-216; 795 NW2d 517 (2010). Defendant asks this Court to consider plaintiff's injuries under the standard set forth in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), but *Kreiner* was explicitly overruled by our Supreme Court in *McCormick*, 487 Mich at 222, and we are bound by stare decisis to follow the standard in *McCormick*. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 447; 761 NW2d 846 (2008).

To establish a serious impairment of body function under *McCormick*, a plaintiff must show:

> (1) an objectively manifested impairment (observable or perceivable from actual symptoms or conditions) (2) of an important body function (a body function of value, significance, or consequence to the injured person) that (3) affects the person's general ability to lead his or her normal life (influences some of the plaintiff's capacity to live in his or her normal manner of living). [*McCormick*, 487 Mich at 215.]

As this Court explained in *Nelson v Dubose*, 291 Mich App 496, 498-499; 806 NW2d 333 (2011):

> *McCormick* shifted the focus from the injuries themselves to how the injuries affected the plaintiff's body

> function. *McCormick*, 487 Mich at 197. This shift eased the burden on the plaintiff to show how the impairment prevented the plaintiff from leading a normal life. Now, the plaintiff has to show that the plaintiff's ability to lead a normal life has been affected by comparing the plaintiff's life before and after the injury. *Id*. at 200, 202–203.

"[A]n 'objectively manifested' impairment is commonly understood as one observable or perceivable from actual symptoms or conditions." *McCormick*, 487 Mich at 196. Plaintiff testified that, when defendant's truck collided with his vehicle, there was a "violent jerk" and he felt immediate pain in his middle and lower back. Plaintiff further testified that his back pain persisted after the accident and that he underwent physical therapy, electronic stimulation, and manipulation under anesthesia. Over time, he was also prescribed stronger pain medications and additional muscle relaxants. Medical documents show that, while plaintiff showed no noticeable back problem on an EMG in February 2010, in March and April, tests showed a herniated disc and pinched nerve in plaintiff's back. While plaintiff underwent these tests several months after the accident and, as the trial court noted, a question of fact remains whether the accident actually caused this condition, plaintiff raised an issue of fact regarding the existence of an objectively manifested impairment.

Plaintiff also presented evidence to raise a question of fact about whether the impairment was to an important body function and whether it affected his ability to lead a normal life. These questions require a case-by-case determination "because what may seem to be a trivial body function for most people may be subjectively important to some, depending on the relationship of that function to the person's life." *Id*. at 199. Further, "[d]etermining the effect or influence that the impair-

ment has had on a plaintiff's ability to lead a normal life necessarily requires a comparison of the plaintiff's life before and after the incident." *Id*. at 202. Plaintiff testified that, for several months after the accident, his back pain prevented him from working, he needed assistance running errands because he could not drive, he needed someone else to cut the grass, rake leaves, do laundry, clean the house, cook, and grocery shop. He further testified that he could not sit or stand for long periods and, therefore, could not attend sporting events or participate in various recreational activities he had enjoyed before the collision. Accordingly, the trial court correctly denied defendant's motion for summary disposition on this ground.

While the trial court correctly ruled that genuine issues of material fact remain in dispute, because this case involves the application of governmental immunity, and because defendant brought its motion under both MCR 2.116(C)(7) and (10), the proper remedy in this case is for the trial court to hold a full evidentiary hearing to determine whether plaintiff did, indeed, suffer a serious impairment of body function and whether the collision caused his injury. *Dextrom*, 287 Mich App at 432. As this Court explained in *Strozier v Flint Community Sch*, 295 Mich App 82, 87-88; 811 NW2d 59 (2011):

> This issue involves an interesting conundrum that arises when motions for summary disposition are brought under both MCR 2.116(C)(10) and (7). Under MCR 2.116(C)(10), when a court determines that a genuine issue of material fact exists, it must deny the motion for summary disposition and allow the fact-finder to resolve the disputed issues of fact at a trial. *Dextrom* [, 287 Mich App at 430]. However, as this Court stated in *Dextrom*, "[a] *trial* is not the proper remedial avenue to take in resolving the

> factual questions under MCR 2.116(C)(7) dealing with governmental immunity." *Id*. at 431.

We further reiterate that "the motor-vehicle exception applies only to liability for 'bodily injury and property damage,' " *Wesche*, 480 Mich at 87 n 12, and plaintiff is only entitled to such excess damages should he prevail on the merits.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

SAWYER, P.J., and METER, J., concurred with SAAD, J.

THOMAS M COOLEY LAW SCHOOL v DOE 1

Docket No. 307426. Submitted December 12, 2012, at Lansing. Decided April 4, 2013 at 9:00 a.m.

Thomas M. Cooley Law School brought an action in the Ingham Circuit Court against four John Doe defendants, alleging, in part, that John Doe 1 (Doe 1) made defamatory statements criticizing Cooley on an Internet website created by Doe 1 under a pseudonym. Cooley then petitioned the Superior Court of California, County of San Francisco, seeking the issuance of a subpoena to Weebly, Inc., the California-based company that is the website host for Doe 1's website, ordering it to produce documents that include Doe 1's user account information, including his identity. The California court issued the subpoena. Doe 1 then filed a motion in the trial court to quash the subpoena or, alternatively, issue a protective order limiting or restricting Cooley's use or disclosure of Doe 1's identifying information. Before the motion to quash was resolved, Weebly released Doe 1's identifying information to Cooley. Cooley then requested that Doe 1 withdraw his motion to quash on the basis that the motion was moot. Doe 1 declined Cooley's request. Cooley then filed an amended complaint that identified Doe 1 by his legal name. Doe 1 supplemented his motion to quash and moved to strike the identifying information. During arguments regarding the motion to quash, Doe 1's counsel agreed that the motion to quash was moot but noted that Doe 1 was, as an alternative, seeking a protective order. The court, Clinton Canady III, J., provisionally ruled under MCR 2.302(B)(7) that Weebly might have inadvertently disclosed the information, struck Cooley's amended complaint, and ordered Cooley not to initiate further discovery or disclose the information pending its final decision on the motion. The court then ruled that the motion to quash was not moot, reasoning that its ruling on Doe 1's motion to strike had placed the parties back in the positions they had occupied before Weebly had disclosed the information. Following further arguments on the motion to quash, the court determined that there was no Michigan law on point and that it would, therefore, examine decisions from other jurisdictions, including *Dendrite Int'l, Inc v Doe, No 3*, 342 NJ Super 134 (2001), and *Doe No 1 v Cahill*, 884 A2d 451 (Del, 2005). The court determined that,

in order to adequately protect Doe 1's interests in remaining anonymous, it must balance those interests against Cooley's interests in holding Doe 1 accountable for alleged defamation. The court adopted and applied the *Dendrite* analysis and ruled that Doe 1 had been notified and that Cooley had sufficiently alleged slander per se. It ruled that statements that are slanderous per se are not entitled to First Amendment protection and, thus, Cooley would not have to prove actual malice. The court denied Doe 1's motion to quash, declined Doe 1's request for a protective order "for the reasons stated on the record," and allowed Cooley to use the information that it had discovered from Weebly. The court, however, stayed its ruling pending Doe 1's appeal to the Court of Appeals. The Court of Appeals granted Doe 1's application for leave to appeal in an unpublished order, entered May 25, 2012 (Docket No. 307426). Cooley moved to dismiss the appeal as moot. The Court of Appeals denied the motion in an unpublished order, entered July 20, 2012 (Docket No. 307426).

The Court of Appeals *held*:

1. The issues presented in this appeal are not moot because Cooley's knowledge of Doe 1's name does not prevent the Court of Appeals from granting relief that will have a practical legal effect on the controversy. There are no indications in this case that Doe 1's anonymity was destroyed either by the disclosure of Doe 1's name in the lower-court record or as a result of his application for membership in the State Bar of California or that the Court of Appeals is unable to fashion the relief Doe 1 seeks. Whether and in what fashion the identity of an anonymous Internet speaker can be discovered or protected under Michigan law is a publically significant issue that is likely to reoccur yet evade judicial review. It is appropriate for the Court of Appeals to reach the merits of the issues in this appeal.

2. An author's decision to remain anonymous is an aspect of the freedom of speech protected by the First Amendment.

3. A defendant's right to speak freely is not absolute; the First Amendment does not protect certain categories of speech, including defamation.

4. A party may acquire information from another party by subpoenaing them to provide a deposition, other documents, or tangible things; a party may petition a court in another state to issue a subpoena or equivalent process if necessary to acquire discovery for an action in Michigan; the court in which the action is pending may, on a motion by a party, quash or modify the subpoena or enter a protective order.

5. A plaintiff claiming defamation must plead its claim with specificity by identifying the exact language that the plaintiff alleges to be defamatory; a plaintiff alleging libel must plead the very words of the libel. Therefore, several questions can be resolved on the pleadings alone, including whether a statement is capable of being defamatory, the nature of the speaker and the level of constitutional protections afforded the statement, and whether actual malice exists, if the level of fault the plaintiff must show is actual malice.

6. The trial court erred by ruling that Michigan law does not adequately address the situation presented in this case. Michigan's procedures for a protective order, when combined with Michigan's procedures for summary disposition, adequately protect a defendant's First Amendment interests in anonymity.

7. Trial courts may use protective orders to protect witnesses' First Amendment rights. A variety of sound or valid reasons may support a trial court's decision to limit discovery, including that discovery implicates a party's First Amendment interests. The court, when determining whether to issue a protective order, may consider the weight of a defendant's First Amendment rights against a plaintiff's discovery request.

8. The trial court erred by concluding that Michigan law does not adequately protect Doe 1's interests and by adopting and applying foreign law. The trial court's findings and conclusions in support of its position were erroneous. The trial court failed to state a reason why it denied Doe 1's alternative request for a protective order. The order of the trial court is reversed and the case is remanded to the trial court for it to consider whether good cause exists to support the request for a protective order.

9. Not all accusations of criminal activity are automatically defamatory. Defamation per se raises the presumption that a person's reputation has been damaged. In that instance, a plaintiff's failure to prove damages for certain charges of misconduct would not require dismissal of the suit.

10. Whether a plaintiff has alleged fault, which may require the plaintiff to show actual malice or negligence depending on the status of the speaker and the topic of the speech, concerns an element separate from whether the plaintiff has alleged defamation per se. The trial court erred by concluding that Cooley would not have to prove fault or other elements because the statements were defamatory per se.

11. The trial court should determine on remand whether it has the power to quash a subpoena issued in California. If not, or if it

declines to do so, the trial court should apply Michigan law and determine if Doe 1 is entitled to an order protecting his identity.

Reversed and remanded.

BECKERING, J., concurring in part and dissenting in part, agreed with the majority that the only remedy available to Doe 1, because his identity is known by Cooley, is a protective order and that, on remand, the trial court must evaluate the necessity of a protective order. Cooley's knowledge of Doe 1's identity did not render his appeal moot. Judge BECKERING does not believe that Michigan law adequately protects a defendant's First Amendment right to speak anonymously when the defendant's identity is sought in a defamation action. Because the court rules do not guarantee that an anonymous defendant will have an opportunity to protect his or her identity before a plaintiff alleging defamation engages in discovery to learn the defendant's identity, the Court of Appeals must adopt a standard that will protect a defendant's right to speak anonymously. A modified *Dendrite* standard should be adopted to strike the appropriate balance between an anonymous defendant's First Amendment rights and a plaintiff's right to learn the defendant's identity in order to seek redress for alleged defamatory statements. Under this standard, a plaintiff alleging defamation may engage in discovery to learn an anonymous defendant's identity only after (1) the plaintiff has made reasonable attempts to notify the defendant and then has given the defendant a reasonable opportunity to defend against the discovery request, (2) the plaintiff has presented the trial court with prima facie evidence sufficient to support each element of its cause of action, other than the elements dependent on the defendant's identity, and (3) the strength of the plaintiff's prima facie case and the necessity of disclosure of the defendant's identity is determined to outweigh the defendant's right to speak anonymously.

1. APPEAL — MOOT ISSUES.

A matter is moot if a ruling by the Court of Appeals cannot for any reason have a practical legal effect on the existing controversy; the Court may, even if the issue is moot, consider a legal issue that is one of public significance that is likely to recur, yet evade judicial review.

2. CONSTITUTIONAL LAW — FREEDOM OF SPEECH — UNITED STATES CONSTITUTION — MICHIGAN CONSTITUTION.

The United States and Michigan Constitutions provide the same protections of the freedom of speech; the Court of Appeals does not

interpret the Michigan Constitution's protections of speech more broadly than the federal constitution's protections (US Const, Am I; Const 1963, art 1, § 5).

3. ACTIONS — DISCOVERY — SUBPOENAS — FOREIGN JURISDICTIONS.

A party to an action in Michigan may petition a court in another state to issue a subpoena or equivalent process if necessary to acquire discovery for the action in Michigan; the court in which the action is pending in Michigan may, on a motion by a party, quash or modify the subpoena or enter a protective order (MCR 2.302[C]; MCR 2.305[D]).

4. LIBEL AND SLANDER — DEFAMATION — ACTIONS — PLEADING.

A plaintiff claiming defamation or libel must plead its claim with specificity by identifying the exact language that is alleged to be defamatory or libelous; several questions raised in the action can be resolved on the pleadings alone, including whether a statement is capable of being defamatory, the nature of the speaker and the level of constitutional protections afforded the statement, and, if the level of fault the plaintiff must show is actual malice, whether actual malice exists.

5. MOTIONS AND ORDERS — PROTECTIVE ORDERS — CONSTITUTIONAL LAW — FIRST AMENDMENT.

Trial courts may use protective orders to protect witnesses' First Amendment interests; a trial court may consider the weight of a defendant's First Amendment rights against a plaintiff's discovery request when determining whether to issue a protective order.

*Miller, Canfield, Paddock and Stone, PLC* (by *Michael P. Coakley* and *Paul D. Hudson*), for Thomas M. Cooley Law School.

*Barbara Harvey*, *John T. Hermann*, and *Paul Alan Levy* for John Doe 1.

Amici Curiae:

*Boyle Burdett* (by *H. William Burdett, Jr.*) and *Daniel S. Korobkin*, *Michael J. Steinberg*, and *Kary L. Moss* for American Civil Liberties Union Fund of Michigan.

*Butzel Long* (by *Robin Luce Herrmann*, *Joseph E. Richotte*, *Jonathan F. Jorissen*, and *Jennifer A. Dukarski*) for Michigan Press Association, Gannett Co., Inc., Scripps Media, Inc., The Detroit News, The Macomb Daily, and The Rail.

Before: WHITBECK, P.J., and METER and BECKERING, JJ.

WHITBECK, P.J. This appeal concerns the complicated interplay between First Amendment protections of the freedom of speech and the Michigan Court Rules concerning discovery. Plaintiff, Thomas M. Cooley Law School (Cooley), filed a complaint in the Ingham Circuit Court against defendant John Doe 1 (Doe 1) and others, alleging, in part, defamation arising from statements that Doe 1 made, under a pseudonym, on a website that criticized Cooley. Doe 1 moved in the trial court to (1) quash a subpoena that Cooley obtained in California seeking his identity, and (2) issue a protective order. Doe 1 now appeals by leave granted an order of the trial court denying his motion to quash the California subpoena. He argues that the First Amendment's protections for anonymous free speech shield his identity. We reverse and remand.

## I. FACTS

### A. BACKGROUND FACTS

Doe 1 created an Internet website at Weebly.com, owned by California-based Weebly, Inc. (Weebly), using the pseudonym "Rockstar05."[1] Doe 1 titled the website "THOMAS M. COOLEY LAW SCHOOL SCAM."

[1] Though this pseudonym is gender neutral and "John Doe 1" may refer to an unknown man or woman, the parties referred to Doe 1 by the masculine gender in their briefs and oral arguments. We will also use the masculine gender.

Describing himself as a former student of Cooley, Doe 1 stated that "Cooley is without a doubt one of the three worst law schools in the United States . . . and [is] considered THE BIGGEST JOKE of all law schools amongst other law students." In the body of the post, Doe 1 listed "multiple reasons for this," including: (1) Cooley's "open door" policy, (2) Cooley's attrition rate and administrative policies, (3) "the 'Cooley Rankings' " (4) that Cooley "IS A DIPLOMA MILL," and (5) that Cooley's graduates are unemployed. Doe 1 claimed that he would "elaborate and address each of these [claims] in order, backed by statistics and facts, painting a real picture of what Cooley is really like[.]"

Doe 1 arranged the body of his blog in an outline format, comprised of headings followed by external website links and Doe 1's commentary. Doe 1's commentary frequently included capital letters, multiple instances of incorrect punctuation, expletives, advice, misspellings, and references to pop culture. Doe 1 permitted visitors to post their own comments on the website, and frequently responded to the commentators. After April 1, 2011, however, he began to "filter" comments, noting that he would delete "any stupid or irrelevant comments or personal attacks[.]"

### B. PROCEDURAL HISTORY BELOW

Cooley filed the complaint in the Ingham Circuit Court on July 14, 2011, against several John Doe defendants. Cooley's complaint against Doe 1 alleged that he made defamatory accusations that Cooley and its representatives "are 'criminals' and have committed 'fraud,' " that Cooley deceived and provided false information to attain business, and that Cooley "uses its clout to 'prey' on current and prospective students, stealing their tuition money to 'become more rich.' " On

July 25, 2011, Cooley petitioned the Superior Court of California, County of San Francisco, to issue a subpoena to Weebly. On August 3, 2011, the California court issued a subpoena to Weebly, ordering it to produce documents that included Doe 1's user account information. On August 5, 2011, Doe 1 filed a motion in the Ingham Circuit Court, requesting that it quash any outstanding subpoenas to Weebly or, alternatively, issue a protective order limiting or restricting Cooley's use or disclosure of his identifying information.

On August 9, 2011, Weebly's chief of customer satisfaction promised Doe 1's attorney that he would not disclose Doe 1's identifying information until August 22, to allow him to obtain a ruling on his motion to quash. But on August 17, 2011, another Weebly employee released Doe 1's identifying information to Cooley. On August 18, 2011, Cooley requested that Doe 1 withdraw his motion to quash on the basis that the motion was now moot; Doe 1 declined.

On August 29, 2011, Cooley filed an amended complaint that identified Doe 1 by his legal name. Doe 1 supplemented his motion to quash and moved in the trial court to strike the identifying information, arguing that Cooley violated Michigan discovery rules by using information that Doe 1 claimed was protected.

### C. THE TRIAL COURT'S DECISION

In September 2011, the trial court heard arguments on Doe 1's motion to quash. Doe 1's counsel agreed that the motion to quash was moot because Weebly had disclosed the information, but clarified that he was "seeking this motion as an alternative, a protective order." The trial court provisionally ruled that Weebly might have inadvertently disclosed the information for the purposes of MCR 2.302(B)(7). It struck Cooley's

amended complaint and ordered Cooley not to initiate further discovery or disclose the information pending its final decision on the motion. On October 3, 2011, the trial court ruled that the motion to quash was not moot, reasoning that its ruling on Doe 1's motion to strike placed the parties back in the positions they occupied before Weebly disclosed the information.

On October 24, 2011, the trial court heard continued arguments on Doe 1's motion to quash. After extensive reasoning, the trial court determined that there was no Michigan law on point and examined decisions from other jurisdictions, including *Dendrite Int'l, Inc v Doe, No 3*[2] and *Doe No 1 v Cahill*.[3] The trial court determined that, in order to adequately protect Doe 1's interests in remaining anonymous, it must balance those interests against Cooley's interests in holding Doe 1 accountable for alleged defamation.

The trial court adopted and applied the *Dendrite* analysis. Under that analysis, it ruled that Doe 1 had been notified and that Cooley had sufficiently alleged slander per se. It ruled that statements that are slanderous per se are not entitled to First Amendment protection, and thus Cooley would not have to prove actual malice. The trial court's order denied Doe 1's motion to quash, declined to grant him a protective order for "the reasons stated on the record," and allowed Cooley to use the information that it discovered from Weebly. However, the trial court stayed its ruling pending Doe 1's appeal to this Court.

On November 29, 2011, Doe 1 filed an application for leave to appeal the trial court's order, which this Court granted in an unpublished order, entered May 25, 2012 (Docket No. 307426). On July 11, 2012, Cooley moved to

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[2] *Dendrite Int'l, Inc v Doe, No 3*, 342 NJ Super 134; 775 A2d 756 (2001).

[3] *Doe No 1 v Cahill*, 884 A2d 451 (Del, 2005).

dismiss this appeal as moot. This Court denied Cooley's motion to dismiss in an unpublished order, entered July 20, 2012 (Docket No. 307426).

## II. MOOTNESS

### A. STANDARD OF REVIEW

This Court reviews de novo questions of law.[4]

### B. LEGAL STANDARDS

Michigan courts exist to decide actual cases and controversies, and thus will not decide moot issues.[5] A matter is moot if this Court's ruling "cannot for any reason have a practical legal effect on the existing controversy."[6] Even if moot, this Court may consider a legal issue that "is one of public significance that is likely to recur, yet evade judicial review."[7]

### C. APPLYING THE STANDARDS

Cooley argues that the issues presented in this appeal are moot because Weebly disclosed Doe 1's identity to Cooley. Therefore, because Cooley cannot "unlearn" his name, Doe 1's anonymity is destroyed. We conclude that the issues presented in this appeal are not moot because Cooley's knowledge does not prevent this Court from granting relief that will have a practical legal effect on the controversy.

Doe 1 filed his motion to quash the subpoena and issue a protective order before Cooley learned his identity.

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[4] *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

[5] *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002).

[6] *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010); *Federated Publications, Inc*, 467 Mich at 112.

[7] *Federated Publications, Inc*, 467 Mich at 112.

Although Cooley filed an amended complaint with Doe 1's true name on it, the trial court acted within 10 days to sequester all documents in the lower-court record that contain Doe 1's name. The trial court also ruled that Doe 1's identifying information was inadvertently disclosed for the purposes of MCR 2.302(B)(7). Cooley argues that members of the public may have accessed the trial court documents in that period, but there is no indication that this actually occurred.

Finally, Cooley contended at oral arguments that, because Doe 1 applied for membership in the State Bar of California, his anonymity was destroyed because the State Bar of California is aware of his involvement in this suit. But it was also stated at oral arguments that applications to the State Bar of California are confidential. Thus, Doe's application alone would not reveal his identity to the public. There are simply no indications that Doe 1's anonymity was destroyed or that this Court is unable to fashion the relief Doe 1 seeks.

Further, whether and in what fashion the identity of an anonymous Internet speaker can be discovered or protected under Michigan law is a publically significant issue concerning the First Amendment. In this age of Internet blogging, this issue is likely to reoccur. And if the disclosure of a John Doe's name to a handful of attorneys and court officers is sufficient to render this issue moot, the issue would also be likely to evade judicial review. We conclude that we may, and should, reach the merits of the issues on appeal.

## III. THE FIRST AMENDMENT AND ANONYMOUS SPEECH

### A. FREEDOM OF SPEECH

The First Amendment of the United States Constitution provides that "Congress shall make no law . . .

abridging the freedom of speech . . . ."[8] The Michigan Constitution provides that "[e]very person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech . . . ."[9] The United States and Michigan Constitutions provide the same protections of the freedom of speech, and this Court does not interpret the Michigan Constitution's protections of speech more broadly than the federal constitution's protections.[10] Thus, this Court may consider federal authority when interpreting the extent of Michigan's protections of free speech.[11]

The United States Supreme Court has held that the federal constitution protects speech over the Internet to the same extent as speech over other media.[12] The United States Supreme Court has also determined that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."[13]

B. DEFAMATORY SPEECH

But a defendant's right to speak freely is not absolute.[14] The First Amendment does not protect "certain

[8] US Const, Am I.

[9] Const 1963, art 1, § 5.

[10] *Woodland v Mich Citizens Lobby*, 423 Mich 188, 208; 378 NW2d 337 (1985); *In re Contempt of Dudzinski*, 257 Mich App 96, 100; 667 NW2d 68 (2003).

[11] *In re Contempt of Dudzinski*, 257 Mich App at 100.

[12] *Reno v American Civil Liberties Union*, 521 US 844, 870; 117 S Ct 2329; 138 L Ed 2d 874 (1997).

[13] *McIntyre v Ohio Elections Comm*, 514 US 334, 342; 115 S Ct 1511; 131 L Ed 2d 426 (1995).

[14] *Chaplinsky v New Hampshire*, 315 US 568, 571; 62 S Ct 766; 86 L Ed 1031 (1942).

categories of speech, including defamation[.]"[15] Generally, " '[a] communication is defamatory if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.' "[16]

### C. STANDARDS PROTECTING ANONYMOUS SPEECH IN OTHER JURISDICTIONS: *DENDRITE*, *CAHILL*, AND OTHER STANDARDS

To very different extents, courts in other jurisdictions have attempted to balance a defendant's right to speak anonymously against a plaintiff's interest in discovering the information necessary to prosecute its defamation claims.

In *Dendrite*, a New Jersey intermediate appellate court determined that, in order to adequately protect a defendant's interests in anonymous commercial speech, it must adopt a four-part approach to limit discovery.[17] The New Jersey court determined that the plaintiff must: (1) show that the defendant is a person or entity who could be sued, (2) make a good-faith effort to serve process on the defendant, (3) establish that the plaintiff's suit could withstand a motion to dismiss, and (4) establish that there is a reasonable likelihood that discovery would lead to identifying information about the defendant that would make service of process possible.[18] It determined that the purpose of this approach was to prevent plaintiffs from attempting to

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[15] *Ashcroft v Free Speech Coalition*, 535 US 234, 245-246; 122 S Ct 1389; 152 L Ed 2d 403 (2002); *Burns v Detroit (On Remand)*, 253 Mich App 608, 621; 660 NW2d 85 (2002).

[16] *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 251; 487 NW2d 205 (1992), quoting 3 Restatement Torts, 2d, § 559, p 156.

[17] *Dendrite Int'l, Inc*, 342 NJ Super at 156-157.

[18] *Id*. at 151-152.

harass, intimidate, or silence anonymous critics on the public forums of the Internet.[19]

Examining the New Jersey court's decision in *Dendrite*, in *Cahill*, the Delaware Supreme Court also described and adopted this standard to protect political speech.[20] The Delaware court concluded that, under *Dendrite*, it was necessary for a plaintiff alleging defamation to show four things before it could identify an anonymous political speaker on the Internet: (1) that the plaintiff tried to notify the defendant of the action in order to allow the defendant to defend, (2) that the plaintiff alleged the exact defamatory statements made by the anonymous poster, (3) that the plaintiff could survive a motion for summary judgment on the prima facie claim, and (4) that the balance of equities between the defendant's First Amendment rights and the strength of the prima facie case indicates that the defendant's identity should be disclosed.[21] The Delaware court concluded that elements two and four were unnecessary because they are subsumed in that state's summary judgment standards; that is, a plaintiff would have to prove each of these elements, but a "four-part" standard was unnecessary because elements two and four were necessarily a part of element three.[22]

The United States Court of Appeals for the Ninth Circuit, the only federal circuit court to consider this issue, held only that the adoption and application of the *Dendrite* or *Cahill* standards to deny a party's writ for mandamus is not clearly erroneous.[23] It recognized that "a few courts have declined to adopt a new or different

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[19] *Id*. at 156.

[20] *Cahill*, 884 A2d at 460.

[21] *Id*.

[22] *Id*. at 461.

[23] *In re Anonymous Online Speakers*, 661 F3d 1168, 1177 (CA 9, 2011).

standard," or have applied heightened standards only to the identification of nonparties.[24] It determined that "the details of fashioning the appropriate scope and procedures for disclosure of the identity of the anonymous speakers" is a matter for the district courts to determine.[25]

Finally, an Illinois court has decided that it was not necessary to adopt additional standards in light of the procedural protections in place under Illinois court rules. In *Maxon v Ottawa Publishing Co*, the Illinois Appellate Court determined whether the plaintiff could discover the identity of blog posters.[26] It decided that it was not necessary to adopt the *Dendrite* or the *Cahill* standards because Illinois court rules required the complainant to plead defamation with particularity, and the complaint was subject to a motion that tested its legal sufficiency on the basis of the facts as pleaded.[27] The *Maxon* court reasoned that the *Dendrite* "hypothetical motion for summary judgment" was unnecessary because the Illinois processes were similar to the standards applied by *Dendrite* and *Cahill* and adequately protect the defendant's interests.[28]

## IV. OVERVIEW OF MICHIGAN PROCEDURAL RULES

In Michigan, discovery is available as soon as a party commences an action.[29] In a civil action, a party commences the action by filing a complaint with a court.[30] A

[24] *Id*. at 1175-1176.

[25] *Id*. at 1177.

[26] *Maxon v Ottawa Publishing Co*, 402 Ill App 3d 704, 706; 929 NE2d 666 (2010).

[27] *Id*. at 712.

[28] *Id*. at 714-715.

[29] MCR 2.302(A)(1).

[30] MCR 2.101(B).

summons is issued that is to be served on the defendant.[31] Generally, a summons expires 91 days after the date the complaint is filed.[32] Upon the expiration of the summons, the case is deemed dismissed with regard to a defendant who has not been served, unless the defendant has submitted to the court's jurisdiction.[33] A party may "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]"[34] Michigan follows a policy of open and broad discovery.[35]

A. SUBPOENAS

A party may acquire information from another party by subpoenaing them to provide a deposition, other documents, or tangible things.[36] A party may petition a court in another state to issue a subpoena or equivalent process if necessary to acquire discovery for an action in Michigan.[37] On a motion by a party, the "court in which the action is pending" may quash or modify the subpoena, or enter a protective order.[38]

B. PROTECTIVE ORDERS

Despite Michigan's broad discovery policy, a trial court should protect parties from excessive, abusive, or

[31] MCR 2.102(A).

[32] MCR 2.102(D).

[33] MCR 2.102(E)(1).

[34] MCR 2.302(B)(1); see *King v Reed*, 278 Mich App 504, 517; 751 NW2d 525 (2008).

[35] *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011).

[36] MCR 2.305(A)(1) and (2).

[37] MCR 2.305(D).

[38] MCR 2.302(C).

irrelevant discovery requests.[39] Thus, a party may bring a motion in a trial court for a protective order:

> On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:
>
> (1) that the discovery not be had;
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> (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
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> * * *
>
> (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
>
> (5) that discovery be conducted with no one present except persons designated by the court[.][40]

A trial court may also seal court records on a motion of a party if it finds good cause to do so and there are no less restrictive means to protect the party's interests.[41]

### C. MOTIONS FOR SUMMARY DISPOSITION

Under MCR 2.116(C)(8), a party may move for summary disposition when the opposing party has failed to state a claim on which relief can be granted. This tests the legal basis of the complaint on the pleadings alone.[42] The trial court must accept the factual allegations in the complaint as true, and construe them in the light

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[39] *Cabrera v Ekema*, 265 Mich App 402, 407; 695 NW2d 78 (2005).

[40] MCR 2.302(C).

[41] MCR 8.119(I)(1).

[42] MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

most favorable to the nonmoving party.[43] The trial court will grant the motion if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify the opposing party's right to recovery.[44]

The availability and application of summary disposition is important in this case because summary disposition is an essential tool to protect First Amendment rights.[45] To eventually succeed on a claim for defamation, a plaintiff must show:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication.[46]

A plaintiff must also comply with constitutional requirements that depend on " 'the public- or private-figure status of the plaintiff, the media or nonmedia status of the defendant, and the public or private character of the speech.' "[47]

A plaintiff claiming defamation must plead a defamation claim with specificity by identifying the exact language that the plaintiff alleges to be defamatory.[48]

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[43] *Maiden*, 461 Mich at 119.

[44] *Id*.

[45] *Tomkiewicz v Detroit News, Inc*, 246 Mich App 662, 666; 635 NW2d 36 (2001); *Ireland v Edwards*, 230 Mich App 607, 619; 584 NW2d 632 (1998).

[46] *Tomkiewicz*, 246 Mich App at 666-667; *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).

[47] *Rouch*, 440 Mich at 251-252, quoting *Locricchio v Evening News Ass'n*, 438 Mich 84, 118; 476 NW2d 112 (1991).

[48] *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc*, 197 Mich App 48, 52, 57; 495 NW2d 392 (1992).

For a claim of libel, a plaintiff must plead " '*the very words of the libel . . . .*' "[49] Because a plaintiff must include the words of the libel in the complaint, several questions of law can be resolved on the pleadings alone, including: (1) whether a statement is capable of being defamatory,[50] (2) the nature of the speaker and the level of constitutional protections afforded the statement,[51] and (3) whether actual malice exists, if the level of fault the plaintiff must show is actual malice.[52]

## V. MICHIGAN DISCOVERY RULES ADEQUATELY PROTECT FIRST AMENDMENT INTERESTS IN ANONYMOUS SPEECH

### A. STANDARD OF REVIEW

This Court reviews de novo issues of constitutional law.[53] Generally, this Court reviews for an abuse of discretion a trial court's decision on a motion for discovery.[54] A trial court abuses its discretion when it chooses an outcome falling outside the range of reasonable and principled outcomes,[55] or when it makes an error of law.[56]

Because this case raises First Amendment issues, we are also "obligated to independently review the entire

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[49] *Id*. at 53, quoting *De Guvera v Sure Fit Prod*, 14 Mich App 201, 206; 165 NW2d 418 (1968).

[50] See *Ireland*, 230 Mich App at 619.

[51] See *New Franklin Enterprises v Sabo*, 192 Mich App 219, 221-222; 480 NW2d 326 (1991); see also *Hodgins v Times Herald Co*, 169 Mich App 245, 256-257; 425 NW2d 522 (1988).

[52] *Ireland*, 230 Mich App at 622.

[53] *In re Contempt of Dudzinski*, 257 Mich App at 99.

[54] *Augustine*, 292 Mich App at 419.

[55] *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003); *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

[56] *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006); *In re Waters Drainage Dist*, 296 Mich App 214, 220; 818 NW2d 478 (2012).

record to ensure that the lower court's judgment 'does not constitute a forbidden intrusion of the field of free expression.' "[57]

B. APPLICATION OF MICHIGAN DISCOVERY RULES TO THIS CASE

In a lengthy ruling from the bench, the trial court ruled that Michigan law does not address the situation in this case. It therefore adopted the *Dendrite* standards. Applying those standards, it determined not to quash the subpoena.

We disagree with the trial court's conclusion that Michigan law does not adequately address this situation. We conclude that Michigan's procedures for a protective order, when combined with Michigan's procedures for summary disposition, adequately protect a defendant's First Amendment interests in anonymity.

Under a properly filed motion for a protective order, a trial court may order, among other things, "that the discovery not be had" or that it "may be had only on specified terms and conditions[.]"[58] In the context of our court rules, "[g]ood cause simply means a satisfactory, sound or valid reason[.]"[59] A trial court has broad discretion to determine what constitutes "good cause."[60] A variety of sound or valid reasons may support a trial court's decision to limit discovery, including that discovery implicates a party's First Amendment interests.

Trial courts may use protective orders to protect

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[57] *Maldonado*, 476 Mich at 388-389, quoting *Gentile v State Bar of Nevada*, 501 US 1030, 1038; 111 S Ct 2720; 115 L Ed 2d 888 (1991) (additional quotation marks and citations omitted).

[58] MCR 2.302(C)(1) and (2).

[59] *People v Buie*, 491 Mich 294, 319; 817 NW2d 33 (2012) (quotation marks and citation omitted).

[60] See *id*. at 319-320.

witnesses' First Amendment interests. For instance, in *Bloomfield Charter Twp v Oakland Co Clerk*, the township sought to depose persons who had signed petitions, and the trial court granted a protective order that prevented the township from deposing the signatories.[61] This Court held that the trial court did not abuse its discretion when it issued the protective order.[62] We reasoned that the signatories had a "powerful interest in participating in political speech protected by the First Amendment without fear of subsequently facing adversarial questions under oath," and that the township's reasons for requesting discovery were baseless.[63]

We recognize that the Michigan Supreme Court subsequently overruled *Bloomfield Charter Twp*, though on different grounds, and thus it is not binding precedent.[64] But the case illustrates that Michigan courts have recognized that a person's right to freedom of speech may be good cause for a trial court to issue a protective order.

Protective orders are very flexible. A trial court may tailor the scope of its protective order to protect a defendant's First Amendment interests until summary disposition is granted. For instance, a trial court may order (1) that a plaintiff not discover a defendant's identity, or (2) that as a condition of discovering a defendant's identity, a plaintiff not disclose that identity until after the legal sufficiency of the complaint itself is tested.

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[61] *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 35; 654 NW2d 610 (2002), overruled on other grounds by *Stand Up For Democracy v Secretary of State*, 492 Mich 588 (2012).

[62] *Bloomfield Charter Twp*, 253 Mich App at 38.

[63] *Id*.

[64] *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009).

Comparing the foreign law that the trial court adopted to existing Michigan law, we disagree with the trial court's determination that Michigan law cannot adequately protect a defendant's interests in anonymous speech. Under *Cahill*, which the Ninth Circuit recognized as providing the "strictest test,"[65] the plaintiff must (1) allege the exact defamatory statements, (2) show that the plaintiff made reasonable efforts to give the defendant notice of the action, (3) show that the plaintiff's case could survive a motion for summary disposition on the prima facie case, and (4) show that the balance of equities between the defendant's interests and its interests weighed in its favor.[66]

But under Michigan law, the plaintiff must allege the exact defamatory statements. The plaintiff will have to survive an actual motion for summary disposition on its claims under MCR 2.116(C)(8). And the trial court may consider the weight of the defendant's First Amendment rights against the plaintiff's discovery request when determining whether to issue a protective order. Thus, the *Dendrite* and *Cahill* standards largely overlap with Michigan's combined safeguards of a protective order under MCR 2.302 and the summary disposition standards and procedures under MCR 2.116(C)(8).

To the extent that Doe 1 urges us to adopt *Dendrite* because it more adequately protects other interests or is better public policy, we decline to do so. Doe 1 argues that any less stringent standards may chill Internet criticisms because of a defendant's fear of being required to defend against a lawsuit for long enough to have the trial court dismiss it. Doe 1 also argues that the plaintiff in a defamation case may sue the defendant solely to subpoena the defendant's Internet provider for

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[65] *In re Anonymous Online Speakers*, 661 F3d at 1177.

[66] *Cahill*, 884 A2d at 460-461.

identifying information in order to acquire leverage for extra-judicial retaliation. We have already concluded that Michigan rules of civil procedure adequately protect Doe 1's constitutional interests. We decline to reach beyond what is constitutionally necessary in order to judicially create anti-cyber-SLAPP legislation.[67] Such decisions of public policy are the province of our Legislature.[68] And the writing, or rewriting, of our discovery and summary disposition rules is the province of the Michigan Supreme Court.

C. THE TRIAL COURT DID NOT PROPERLY APPLY MICHIGAN LAW

We conclude that the trial court abused its discretion, which requires reversal. A trial court by definition abuses its discretion when it inappropriately interprets and applies the law.[69] First, the trial court erroneously concluded that Michigan law does not adequately protect Doe 1's interests, and then it erroneously adopted and applied foreign law. Second, the trial court's findings and conclusions in support of its position were erroneous. Third, the trial court did not state any reason supporting its decision to deny Doe 1's alternative request for a protective order.

After adopting the *Dendrite* and *Cahill* standards as Michigan law, the trial court appears to have considered only two alternatives: (1) that the subpoena should be quashed and Cooley's case dismissed, or (2) that the subpoena should not be quashed and the case should proceed with Doe 1's name on the complaint. But Michigan law does not address only these polar oppo-

[67] SLAPP is an acronym for "strategic lawsuit against public participation." Black's Law Dictionary (7th ed).

[68] *Johnson v Recca*, 492 Mich 169, 196-197; 821 NW2d 520 (2012).

[69] *Giovannini*, 271 Mich App at 417; *In re Waters Drainage Dist*, 296 Mich App at 220.

sites. Doe 1 also asked for a protective order under MCR 2.302(C). The trial court's order indicates that it denied Doe 1's requests for a protective order "for the reasons stated on the record." But the trial court did not state any reasons on the record to deny the protective order. The trial court appears not to have considered whether or to what extent to protect Doe 1's identity after it determined not to quash the subpoena. On remand, the trial court should consider whether good cause exists to support Doe 1's request for a protective order.

Next, the trial court ruled that defamatory statements per se were not entitled to First Amendment protections. The trial court was incorrect. Not all accusations of criminal activity are automatically defamatory.[70] To put it simply, defamation per se raises the presumption that a person's reputation has been damaged. In that instance, a plaintiff's failure to prove damages for certain charges of misconduct would not require dismissal of the suit.[71] Whether a plaintiff has alleged fault—which may require the plaintiff to show actual malice or negligence, depending on the status of the speaker and the topic of the speech—concerns an element separate from whether the plaintiff has alleged defamation per se. Thus, the trial court erroneously concluded that Cooley would not have to prove fault or other elements because the statements were defamatory per se.

More importantly, this erroneous determination was central to the considerations the trial court may balance when determining whether to issue a protective order. As noted above, a trial court may consider that a party seeking a protective order has alleged that the interests

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[70] See *Kevorkian v American Med Ass'n*, 237 Mich App 1, 12-13; 602 NW2d 233 (1999).

[71] *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 727-728; 613 NW2d 378 (2000).

he or she is asking the trial court to protect are constitutionally shielded.[72] But the trial court need not, and should not, confuse the issues by making a premature ruling—as though on a motion for summary disposition—while considering whether to issue a protective order before the defendant has filed a motion for summary disposition. The trial court should only consider whether good cause exists to issue a protective order, and to what extent to grant relief under MCR 2.302(C).

Doe 1 urges this Court to rule that Cooley has not pleaded legally sufficient claims for defamation and tortious interference with a business relationship. We conclude that Doe 1's motion for a protective order did not present the appropriate time or place to do this. These rulings are best made in the context of a motion for summary disposition, when the trial court is testing the legal sufficiency of the complaint. The trial court's only concerns during a motion under MCR 2.302(C) should be whether the plaintiff has stated good cause for a protective order and to what extent to issue a protective order if it determines that one is warranted.

### D. THE EXTREME CASE

We recognize that this opinion does not address the extreme case, a case that Doe 1 would like us to consider. The extreme case is one in which a plaintiff in a defamation case sues the defendant *solely* to subpoena the defendant's Internet provider for identifying information in order to retaliate against the defendant in some fashion outside a court action.

A simple hypothetical illustrates this situation. Assume that plaintiff XYZ company sues defendant Rich-

[72] See *Bloomfield Charter Twp*, 253 Mich App at 38.

ard Moe who writes an anonymous blog on the Internet that is often critical of XYZ. Assume further that XYZ does not have any real expectation of damages, but suspects that Moe is employed or paid by a competitor and is suing simply to learn Moe's name in order to silence him through legal (we hasten to add) but extrajudicial means.

Under the Michigan rules, as we outlined above, XYZ could sue Moe and then immediately pursue discovery against the Internet provider (the counterpart to Weebly in this action), during the 91-day service-of-summons period provided in the court rules, to obtain Moe's real name. But XYZ does not—and indeed could not, because it does not at that point know Moe's name—serve Moe with process. Thus, Moe would be totally unaware of the suit against him and could not protect his name in court. He will only know of the suit and XYZ's actions when he is "outed" through discovery, and his employer may discharge him if XYZ retaliates with an aggressive ad campaign based on Moe's real identity and affiliation with the competitor.

It is this extreme case that both *Dendrite* and *Cahill*, through their notice provisions, address by providing some protection to persons in Moe's situation. But, we emphasize, this is not the case before us. Here, Doe 1 knew relatively early on that Cooley had filed suit against him and was attempting to ascertain his real name through its subpoena to Weebly. And Doe 1 has been successful, at least to date, in preventing a public disclosure of his name. We therefore decline, under the well-recognized concept of judicial restraint,[73] to go beyond the facts that are before us in this case. We do

[73] See Occam's razor, a principle of parsimony, which may be paraphrased as providing that simpler explanations are, other things being equal, generally better than more complex ones.

not issue advisory opinions, nor does the Supreme Court, except in very limited circumstances not present here.[74] We believe that our legal system in Michigan is capable of responding, either retroactively through litigation or prospectively through Supreme Court rulemaking, if and when the extreme case arises.

### E. COOLEY'S ALTERNATIVE GROUND FOR AFFIRMANCE

Cooley argues as alternative grounds for affirmance that a Michigan court cannot quash a subpoena issued by a California court. Cooley argues that the trial court must look to the law of the state in which the subpoena is pending to determine whether it can quash the subpoena. Under California law, Cooley therefore argues, Doe 1 should have filed his motion to quash and motion for a protective order in "the county in which discovery is to be conducted . . . ."[75] The trial court did not consider this argument, and the parties did not extensively brief this issue.

However, Cooley's argument appears to confuse MCR 2.305(D), under which Michigan allows a party to a Michigan action to petition a foreign court to issue a subpoena to require a person to give a deposition, with MCR 2.302(C). Doe 1 petitioned in the trial court for a protective order under MCR 2.302(C), which provides that "the court *in which the action is pending* may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]"

Thus, even if the trial court did not have the power to quash the California subpoena, the trial court had the

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[74] Const 1963, art 3, § 8; see *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 55; 620 NW2d 546 (2000).

[75] Cal Code Civ Proc 2029.600.

power to issue a protective order under Michigan court rules, because the action is pending in the Ingham Circuit Court. Therefore, even if we determined that the trial court did not have the power to quash the California subpoena issued under MCR 2.305(D), it would still be necessary for this Court to reverse and remand for the trial court to determine whether justice requires it to issue a protective order. Finally, a decision of the trial court would aid our analysis on this issue. We decline to affirm on the ground that the trial court could not quash a California subpoena.

## VI. CONCLUSION

We conclude that the trial court abused its discretion when it denied Doe 1's motion for a protective order after it adopted and applied foreign law. Michigan law adequately protects Doe 1's free speech interests in this case. On remand, the trial court should determine whether it has the power to quash a California subpoena. If not, or if it declines to do so, the trial court should apply Michigan law to determine whether Doe 1 is entitled to an order protecting his identity.

Reversed and remanded. We do not retain jurisdiction.

METER, J., concurred with WHITBECK, P.J.

BECKERING, J. (*concurring in part and dissenting in part*). With the advent of the Internet and the accompanying easy, rapid, and global exchange of information and opinions, new legal issues have come to the forefront. This case presents one of those new legal issues and involves a matter of first impression in Michigan. How do we balance a defendant's First Amendment right to speak anonymously and a plaintiff's right to

learn an anonymous defendant's identity in order to seek redress for the defendant's alleged defamatory statements? In this case, plaintiff, Thomas M. Cooley Law School (Cooley), alleges that defendant John Doe 1 (Doe 1), a former Cooley student, defamed it in his weblog post titled "Thomas M. Cooley Law School Scam." Cooley sued Doe 1 and others for defamation and tortious interference. It then obtained a subpoena from a California court that ordered Weebly, Inc. (Weebly), the website host for Doe 1's weblog, to produce documents that included Doe 1's user account information. Doe 1 learned that he had been sued after reading about Cooley's lawsuit in the media. He moved in the trial court to quash the subpoena or, in the alternative, for a protective order limiting or restricting Cooley's use of any information obtained pursuant to the subpoena. Unfortunately, before the trial court resolved the motion to quash, and through no apparent fault of either party, Weebly disclosed Doe 1's user account information to Cooley. Cooley now knows Doe 1's identity.

I agree with my colleagues in the majority that the only remedy available to Doe 1, because his identity is known by Cooley, is a protective order and that the trial court, on remand, must evaluate the necessity of a protective order. As noted by the majority, and contrary to Cooley's argument, Cooley's knowledge of Doe 1's identity does not render Doe 1's appeal moot. It is possible to fashion a remedy, a protective order, if merited, that will have a practical legal effect on the controversy.[1] A protective order can prevent Doe 1's identity from being disclosed to others. I also agree with the majority that we may, and should, review the issue

[1] *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010).

whether Michigan law adequately protects the respective rights of plaintiffs and defendants in the complicated interplay between the First Amendment right of anonymous free speech and a person's right to know the identity of his or her defamer. The issue is a matter of public significance that is likely to recur, yet evade judicial review.[2]

Where I diverge from the majority is in its conclusion that Michigan law adequately protects a defendant's right to anonymous free speech except for the "extreme" case. Because an anonymous defendant cannot undertake any efforts to protect against disclosure of his or her identity until the defendant learns about the lawsuit—which may well be too late given that discovery is available to a plaintiff as soon as the action is commenced—we, like numerous appeal courts in other jurisdictions, must adopt a formal procedure that balances the rights of plaintiffs and defendants. The majority of jurisdictions that have addressed this issue have adopted the standard of either *Dendrite Int'l, Inc v Doe, No 3*[3] or *Doe No 1 v Cahill*.[4] These standards require, in part, that a plaintiff alleging defamation present the trial court with prima facie evidence on the elements of its defamation claim before it is allowed to discover the anonymous defendant's identity. I would adopt a modified version of the *Dendrite* standard.

## I. THE FIRST AMENDMENT AND DEFAMATION

### A. THE RIGHT TO FREE SPEECH

The First Amendment of the United States Constitution provides: "Congress shall make no law . . .

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[2] *Id*.

[3] *Dendrite Int'l, Inc v Doe, No 3*, 342 NJ Super 134; 775 A2d 756 (2001).

[4] *Doe No 1 v Cahill*, 884 A2d 451 (Del, 2005).

abridging the freedom of speech . . . ."[5] The Michigan Constitution provides: "Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press."[6] Because the right to free speech under the Michigan Constitution is coterminous with the right to free speech under the First Amendment, this Court may use federal authority to interpret Michigan's guarantee of free speech.[7]

The right to free speech includes the right to speak anonymously.[8] Numerous reasons exist for why a person may chose to speak anonymously. "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible."[9] Whatever the person's reason to speak anonymously, "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry."[10] The right to free speech extends to speech on the Internet.[11]

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[5] US Const, Am 1. The First Amendment is applicable to the states under the Fourteenth Amendment. *Schneider v State*, 308 US 147, 160; 60 S Ct 146; 84 L Ed 155 (1939).

[6] Const 1963, art 1, § 5.

[7] *In re Contempt of Dudzinski*, 257 Mich App 96, 100; 667 NW2d 68 (2003).

[8] *McIntyre v Ohio Elections Comm*, 514 US 334, 342; 115 S Ct 1511; 131 L Ed 2d 426 (1995).

[9] *Id*. at 341-342.

[10] *Id*. at 342.

[11] *Reno v American Civil Liberties Union*, 521 US 844, 870; 117 S Ct 2329; 138 L Ed 2d 874 (1997) (stating that caselaw from the United States Supreme Court "provide[s] no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]").

However, "the right of free speech is not absolute at all times and under all circumstances."[12] It provides no protection to defamatory statements.[13] A statement "is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[14]

The elements of a defamation claim are the following:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication.[15]

In addition, if the plaintiff is a public official or a public figure, the plaintiff must prove that the alleged defamatory statement was made with actual malice, i.e., that the statement was made with knowledge of its falsity or with reckless disregard of whether the statement was false.[16]

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[12] *Chaplinsky v New Hampshire*, 315 US 568, 571; 62 S Ct 766; 86 L Ed 1031 (1942).

[13] *Ashcroft v Free Speech Coalition*, 535 US 234, 245-246; 122 S Ct 1389; 152 L Ed 2d 403 (2002); *Beauharnais v Illinois*, 343 US 250, 266; 72 S Ct 725; 96 L Ed 919 (1952) (stating that "[l]ibelous utterances" are not within the scope of constitutionally protected speech).

[14] *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 113; 793 NW2d 533 (2010) (quotation marks and citation omitted).

[15] *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).

[16] *Garvelink v Detroit News*, 206 Mich App 604, 608; 522 NW2d 883 (1994).

C. BALANCING THE EQUITIES AND RIGHTS OF THE PARTIES:

THE *CAHILL* AND *DENDRITE* STANDARDS

Although this Court has never addressed the relationship between a defendant's right to speak anonymously and a plaintiff's right to learn an anonymous defendant's identity, numerous courts in other jurisdictions have addressed this issue. As mentioned, Doe 1 requests that this Court adopt the standard articulated in either *Dendrite* or *Cahill*.

In *Dendrite*, a New Jersey intermediate appellate court was called on to determine the standard trial courts were to use in evaluating applications to discover the identity of anonymous users of Internet message boards.[17] It adopted a four-part test for trial courts to apply when a plaintiff seeks the disclosure of an anonymous defendant's identity.[18] First, the plaintiff must undertake efforts to notify the anonymous defendant and then withhold action to afford the defendant a reasonable opportunity to oppose the discovery request.[19] According to the court, the notification efforts should include placing a message regarding the discovery request on the Internet message board on which the alleged defamatory statement was posted.[20] Second, the plaintiff must identify the exact statements that it claims were defamatory.[21] Third, the trial court must review the complaint and all the information provided by the plaintiff and determine whether the plaintiff has set forth a prima facie case against the anonymous defendant.[22] The plaintiff's case must not only be able to

[17] *Dendrite*, 342 NJ Super at 140.

[18] *Id*. at 141-142.

[19] *Id*. at 141.

[20] *Id*.

[21] *Id*.

[22] *Id*.

withstand a motion to dismiss for failure to state a claim; it must also present the trial court with prima facie evidence sufficient to support each element of the cause of action.[23] Fourth, if the plaintiff has presented a prima facie case, the trial court must balance the anonymous defendant's First Amendment rights against the strength of the plaintiff's prima facie case and the necessity of disclosure of the defendant's identity to allow the plaintiff to proceed.[24]

In *Cahill*, the Delaware Supreme Court was called on to adopt a standard for trial courts to apply when a plaintiff alleging defamation seeks to discover the identity of an anonymous defendant.[25] The court was concerned about adopting a standard that was too low and would chill persons from exercising their right to speak:

> The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all. A defamation plaintiff, particularly a public figure, obtains a very important form of relief by unmasking the identity of his anonymous critics. The revelation of identity of an anonymous speaker "may subject [that speaker] to ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those whom she criticizes, or simply give unwanted exposure to her mental processes." Plaintiffs can often initially plead sufficient facts to meet the good faith test applied by the [trial c]ourt, even if the defamation claim is not very strong, or worse, if they do not intend to pursue the defamation action to a final decision. After obtaining the identity of an anonymous critic through the compulsory discovery process, a defamation plaintiff who either loses on the merits or fails to pursue a lawsuit is still free to engage in extra-judicial self-help remedies; more bluntly, the plaintiff can simply seek revenge or retribution.

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[23] *Id*.

[24] *Id*. at 142.

[25] *Cahill*, 884 A2d at 457.

> Indeed, there is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics. As one commentator has noted, "the sudden surge in John Doe suits stems from the fact that many defamation actions are not really about money." "The goals of this new breed of libel action are largely symbolic, the primary goal being to silence John Doe and others like him." This "sue first, ask questions later" approach, coupled with a standard only minimally protective of the anonymity of defendants, will discourage debate on important issues of public concern as more and more anonymous posters censor their online statements in response to the likelihood of being unmasked.[26]

The Delaware Supreme Court concluded that application of a summary judgment standard, which requires a plaintiff to present evidence sufficient to create a genuine issue of material fact, sufficiently balanced a defendant's right to speak anonymously with a plaintiff's right to protect its reputation.[27] Accordingly, following the New Jersey intermediate appellate court in *Dendrite*, the Delaware Supreme Court held in *Cahill* that, before a defamation plaintiff may discover an anonymous defendant's identity, the plaintiff must support its defamation claim with evidence sufficient to defeat a summary judgment motion.[28] The court, however, did not adopt the complete four-part *Dendrite* standard. It only retained the first and third prongs, holding that a defamation plaintiff (1) must make reasonable efforts to notify the anonymous defendant and then withhold action to afford the defendant an opportunity to oppose the discovery request and (2) must satisfy a summary judgment standard.[29] Accord-

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[26] *Id*. at 457 (first alteration in original; citations omitted).

[27] *Id*. at 460, 463.

[28] *Id*. at 457, 460, 463.

[29] *Id*. at 460-461.

ing to the court, the notification prong imposed very little burden on a plaintiff alleging defamation while giving an anonymous defendant the opportunity to respond.[30] When a party's First Amendment rights were implicated, the court disfavored ex parte discovery requests that afforded a plaintiff the important relief, and sometimes the only desired relief, of unmasking the defendant.[31] In regard to the plaintiff's burden to satisfy a summary judgment standard, the court explained that a plaintiff was only required to produce evidence on the elements of a defamation claim that were in its control.[32] It explained that because proof of actual malice might be impossible without knowing the defendant's identity, a public-figure plaintiff was not required to present proof of actual malice.[33] According to the court, the second and fourth prongs of the *Dendrite* standard were unnecessary.[34] It explained that a plaintiff, to survive a motion for summary judgment, will quote the alleged defamatory statements in the complaint.[35] It also explained that the summary judgment standard, itself, was the balancing test of a defendant's First Amendment rights and the strength of a plaintiff's defamation claim.[36]

Numerous appellate courts have adopted either the *Dendrite* or *Cahill* standard or some form of one of the two standards.[37]

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[30] *Id*. at 461.

[31] *Id*. at 457, 461.

[32] *Id*. at 464.

[33] *Id*.

[34] *Id*. at 461.

[35] *Id*.

[36] *Id*.

[37] See *Mobilisa, Inc v Doe 1*, 217 Ariz 103, 111-112; 170 P3d 712 (Ariz App, 2007) (adopting the *Cahill* standard but stating that a balancing

II. THE NEED FOR ADOPTION OF A STANDARD IN MICHIGAN

The majority concludes that the procedures for a protective order, when combined with the procedures for summary disposition, will be sufficient in nearly every case to adequately protect a defendant's right to speak anonymously. I respectfully disagree.

When presented with a "motion by a party or by the person from whom discovery is sought" a trial court may issue a protective order.[38] However, an anonymous defendant can only request a protective order and ask that the plaintiff be prohibited from unmasking his or her identity or that, as a condition of discovering his or her identity, the plaintiff not disclose his or her identity to third parties, if the defendant knows of the plaintiff's defamation lawsuit and discovery request. There is no guarantee that an anonymous defendant will learn of the plaintiff's lawsuit and its attempt to discover his or her identity in time to request a protective order. Parties may obtain discovery as soon as an action is commenced,[39] and a civil action is commenced when a

test remains necessary); *Krinsky v Doe 6*, 159 Cal App 4th 1154, 1171-1172; 72 Cal Rptr 3d 231 (2008) (stating that it agrees with the courts that have required the plaintiff to make a prima facie showing of the elements of defamation); *Solers, Inc v Doe*, 977 A2d 941, 954-956 (DC App, 2009) (adopting a test that "closely resembles" the *Cahill* standard); *In re Indiana Newspapers Inc*, 963 NE2d 534, 552 (Ind App, 2012) (adopting the *Dendrite* standard but only requiring the plaintiff to produce evidence to support the elements of the claim that are not dependent on the anonymous defendant's identity); *Indep Newspapers, Inc v Brodie*, 407 Md 415, 454-456; 966 A2d 432 (2009) (adopting the *Dendrite* standard); *Mtg Specialists, Inc v Implode-Explode Heavy Indus, Inc*, 160 NH 227, 239; 999 A2d 184 (2010) (adopting the *Dendrite* standard); *Pilchesky v Gatelli*, 2011 PA Super 3; 12 A3d 430, 442-446 (2011) (adopting a "modified version" of the *Dendrite* and *Cahill* standards); *In re Does 1-10*, 242 SW3d 805, 821-823 (Tex App, 2007) (adopting the *Cahill* standard).

[38] MCR 2.302(C).

[39] MCR 2.302(A)(1).

complaint is filed.[40] Although a plaintiff may not take the deposition of a person or send a request for production to a nonparty without leave of the trial court until the defendant "has had a reasonable time to obtain an attorney," the court may grant leave to conduct the discovery without notice having been given to the defendant.[41]

In the present case, Doe 1 did not receive notice from Cooley of the defamation lawsuit or of the subpoena that it obtained directing Weebly to produce his user account information. According to Doe 1, he learned of the defamation lawsuit because Cooley issued a press release after it filed suit. Had Doe 1 not learned of the defamation lawsuit through the media, which caused him to hire an attorney who moved to quash Cooley's subpoena, Cooley could have discovered and publicized Doe 1's identity before Doe 1 even learned that he had been sued for defamation. In my view, the court rules do not preclude such an outcome in a future case.

In my opinion, because the court rules do not guarantee that an anonymous defendant will have an opportunity to protect his or her identity before a plaintiff alleging defamation engages in discovery to learn the defendant's identity, this Court must adopt a standard that will protect a defendant's right to speak anonymously. I acknowledge the majority's concern that it is the province of the Legislature to enact an anti-SLAPP statute[42] and that it is the province of the Michigan Supreme Court to write, or rewrite, the court rules regarding discovery and summary disposition. However, in the absence of action by the Legislature or the

[40] MCR 2.101(B).

[41] MCR 2.306(A)(1); MCR 2.307(A)(1); MCR 2.310(D)(1).

[42] SLAPP is an acronym for "strategic lawsuit against public participation." Black's Law Dictionary (7th ed).

Supreme Court, I see nothing wrong with this Court's adopting a standard that is the same as or similar to one that has been adopted by numerous appellate courts across the country to protect the First Amendment right to speak anonymously. Although this right is not absolute,[43] it "would be of little practical value if there was no concomitant right to remain anonymous after the speech is concluded."[44] Failure by this Court to adopt a standard that protects the constitutional right to speak anonymously could intimidate persons into self-censoring their comments or not speaking at all.[45]

## III. A MODIFIED *DENDRITE* STANDARD

I agree with the courts in *Dendrite* and *Cahill* that a standard requiring a plaintiff to present prima facie evidence to create a genuine issue of material fact on the elements of its defamation claim is one that strikes an appropriate balance between a plaintiff's right to sue for defamation and a defendant's right to speak anonymously. To be clear, I do not wish to prohibit any plaintiff from pursuing redress to which he or she is entitled for having been defamed. As noted above, the right to free speech is not absolute; it does not protect defamatory statements. "Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right . . . ."[46] However, the interests of both plaintiffs and defendants must be considered, and a defendant should be given an opportunity to protect his or her right to anonymity before it is too late. I would adopt a modified *Dendrite* standard to afford defendants this opportunity.

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[43] *Chaplinsky*, 315 US at 571.

[44] *In re Does 1-10*, 242 SW3d at 820.

[45] See *Cahill*, 884 A2d at 457.

[46] Const 1963, art 1, § 5.

The first requirement of the *Dendrite* standard, which is also part of the *Cahill* standard, is that the plaintiff must undertake reasonable efforts to notify the anonymous defendant that his or her identity is, or will be, the subject of a discovery request.[47] I would adopt this requirement. "A court should not consider impacting a speaker's First Amendment rights without affording the speaker an opportunity to respond to the discovery request."[48] Thus, at a minimum, the plaintiff should attempt to notify the anonymous defendant through the same medium used by the defendant to post the alleged defamatory statement. For example, if the anonymous defendant posted the statement on a message board, the plaintiff should post a message notifying the defendant of the impending discovery request on the same message board.[49] Then, after making reasonable efforts, the plaintiff must withhold action to allow the defendant an opportunity to oppose the discovery request.[50]

The second requirement of the *Dendrite* standard is that the plaintiff set forth the exact statements by the defendant that it claims were defamatory.[51] I would not adopt this requirement because it is unnecessary. Michigan caselaw requires that alleged defamatory statements be specifically pleaded in the complaint.[52]

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[47] *Cahill*, 884 A2d at 460-461; *Dendrite*, 342 NJ Super at 141.

[48] *Mobilisa, Inc*, 217 Ariz at 110.

[49] *Id*. at 110-111; *Cahill*, 884 A2d at 461; *Dendrite*, 342 NJ Super at 141.

[50] *Cahill*, 884 A2d at 461; *Dendrite*, 342 NJ Super at 141.

[51] *Dendrite*, 342 NJ Super at 141.

[52] See *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc*, 197 Mich App 48, 53-54; 495 NW2d 392 (1992); *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74, 77-78; 480 NW2d 297 (1991).

The third requirement of the *Dendrite* standard, which is also part of the *Cahill* standard, is that the plaintiff must present to the trial court prima facie evidence sufficient to support each element of its cause of action.[53] Michigan is a notice-pleading state.[54] Therefore, a complaint need only "set forth 'allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend[.]' "[55] A court may grant summary disposition under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted.[56] In deciding such a motion, a court must accept the factual allegations as true and view them in the light most favorable to the nonmoving party.[57] A motion under MCR 2.116(C)(8) may only be granted if no factual development could possibly justify recovery.[58] I acknowledge that claims of defamation must be specifically pleaded, including the defamatory words, the connection between the plaintiff and the defamatory words, and the publication of the defamatory words.[59] However, because of the relative ease to plead a claim that survives a motion for summary disposition under MCR 2.116(C)(8), I do not believe that subjecting a plaintiff's defamation complaint to an MCR 2.116(C)(8) standard, in order to determine whether the plaintiff is entitled to discover a defendant's identity, provides sufficient protection to a defendant's First Amendment right to speak anonymously.

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[53] *Dendrite*, 342 NJ Super at 141; *Cahill*, 884 A2d at 460-461, 463.

[54] *Johnson v QFD, Inc*, 292 Mich App 359, 368; 807 NW2d 719 (2011).

[55] *Id*., quoting MCR 2.111(B)(1).

[56] *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010).

[57] *Johnson v Pastoriza*, 491 Mich 417, 435; 818 NW2d 279 (2012).

[58] *Id*.

[59] *Gonyea*, 192 Mich App at 77.

I agree with the courts in *Dendrite* and *Cahill* that requiring the plaintiff to produce prima facie evidence sufficient to support each element of its cause of action more appropriately protects an anonymous defendant's First Amendment rights. "Requiring the [plaintiff] to satisfy this step furthers the goal of compelling identification of anonymous internet speakers only as a means to redress legitimate misuses of speech rather than as a means to retaliate against or chill legitimate uses of speech."[60] Essentially, a plaintiff must produce factual support for its defamation claim to withstand a summary disposition motion under MCR 2.116(C)(10). Summary disposition is proper under MCR 2.116(C)(10) when there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.[61] Because the plaintiff must produce the evidence before it learns the defendant's identity, I agree with the court in *Cahill* that the plaintiff should not be required to produce evidence on any element that is dependent on the defendant's identity, such as the defendant's fault in publishing the statement.[62] Requiring the plaintiff to present evidence on the elements of the claim that are not dependent on the defendant's identity, such as the alleged defamatory statement, publication, falsity, and harm (if necessary) will not, in my estimation, be overly burdensome. The elements can generally be established either through production of the alleged defamatory statement or through the plaintiff's affidavit.

The fourth requirement of the *Dendrite* standard is that the court must balance the defendant's First

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[60] *Mobilisa, Inc*, 217 Ariz at 111.

[61] *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 599; 792 NW2d 344 (2010).

[62] *Cahill*, 884 A2d at 464; see also *Mobilisa, Inc*, 217 Ariz at 111.

Amendment rights against the strength of the plaintiff's case and the necessity for disclosure of the defendant's identity to allow the plaintiff to proceed.[63] Unlike the court in *Cahill*,[64] I would not dispose of this requirement. In my view, the balancing test serves as a safety mechanism. It permits a trial court to consider and balance all the circumstances and any idiosyncrasies in the case.

I clarify that a plaintiff, by satisfying this modified *Dendrite* standard, would only be entitled to discover the anonymous defendant's identity. After the plaintiff has learned the defendant's identity, the case must proceed along the normal channels of civil procedure, including discovery, case evaluation, summary disposition motions, and, possibly, trial. A plaintiff's satisfaction of the modified *Dendrite* standard does not necessarily mean that the real purpose of the plaintiff's lawsuit was not to unmask the defendant and then engage in extrajudicial self-help remedies. Neither does a plaintiff's satisfaction of the modified *Dendrite* standard establish that the plaintiff will ultimately prevail on its defamation claim. Accordingly, even after a trial court permits a plaintiff to engage in discovery to learn an anonymous defendant's identity, the court retains discretion to enter any protective orders that it deems necessary to protect the defendant's First Amendment rights.[65]

I do not believe that this Court has to create any new proceedings in order for a trial court to apply the modified *Dendrite* standard to a discovery request of a plaintiff alleging defamation who seeks to learn the identity of an anonymous defendant. Michigan follows

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[63] *Dendrite*, 342 NJ Super at 142.

[64] *Cahill*, 884 A2d at 461.

[65] MCR 2.302(C).

an open, broad discovery policy,[66] and discovery is available on any matter, not privileged, that is relevant to the subject matter of the action.[67] There are two relevant and important limitations on a party's right to discovery. First, despite the broad scope of discovery, the court rules acknowledge the wisdom of placing limits on discovery.[68] MCR 2.302(C) provides, in relevant part:

> On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:
>
> (1) that the discovery not be had;
>
> (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
>
> (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
>
> (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
>
> (5) that discovery be conducted with no one present except persons designated by the court[.]

"Good cause simply means a satisfactory, sound or valid reason[.]"[69] Protective orders may be used to protect

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[66] *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011).

[67] MCR 2.302(B)(1).

[68] *Alberto v Toyota Motor Corp*, 289 Mich App 328, 336; 796 NW2d 490 (2010).

[69] *People v Buie*, 491 Mich 294, 319; 817 NW2d 33 (2012) (quotation marks and citation omitted).

First Amendment rights.[70] Second, as already indicated, although parties may engage in discovery after an action is commenced,[71] and an action is commenced by the filing of a complaint,[72] a plaintiff may need to obtain leave of the court to engage in discovery.[73]

The court rules provide two methods by which a party can obtain discovery from a nonparty: (1) deposition and (2) request for production. A party may depose "a person, including a party," either on oral examination or on written questions,[74] and a deposition may be for the sole purpose of the production of documents or other tangible items for inspection and copying.[75] A party desiring to take the deposition of a person must give written notice to every other party to the action.[76] The notice must name the person to be deposed and, for a deposition on oral examination, the notice must state the time and place for the deposition.[77] A party may request a "nonparty" to produce and permit the party to inspect and test or sample tangible things.[78] A copy of the request must be served on the other parties.[79]

After an action has been commenced, a party generally does not need to obtain leave of the court to depose

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[70] See *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 38; 654 NW2d 610 (2002), overruled on other grounds *Stand Up For Democracy v Secretary of State*, 492 Mich 588 (2012).

[71] MCR 2.302(A)(1).

[72] MCR 2.101(B).

[73] MCR 2.306(A)(1).

[74] MCR 2.306; MCR 2.307.

[75] MCR 2.305(A)(3).

[76] MCR 2.306(B)(1); MCR 2.307(A)(2).

[77] MCR 2.306(B)(1); MCR 2.307(A)(2).

[78] MCR 2.310(B)(2).

[79] MCR 2.310(D)(2).

a person.[80] However, "[l]eave of court, granted with or without notice, *must* be obtained . . . if the plaintiff seeks to take a deposition before the defendant has had a reasonable time to obtain an attorney."[81] A reasonable time has elapsed if:

> (a) the defendant has filed an answer;
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> (b) the defendant's attorney has filed an appearance;
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> (c) the defendant has served notice of the taking of a deposition or has taken other action seeking discovery;
>
> (d) the defendant has filed a motion under MCR 2.116; or
>
> (e) 28 days have expired after service of the summons and complaint on a defendant or after service made under MCR 2.106.[82]

The term "must" indicates a mandatory requirement.[83] Similarly, a party may submit a request for production of documents to a nonparty "at any time, except that leave of the court is required if the plaintiff seeks to serve a request before the occurrence of one of the events stated in MCR 2.306(A)(1)."[84]

Presumably, because the plaintiff has sued an anonymous defendant and because the plaintiff wants to learn the defendant's identity, the defendant has not yet been served with process. Accordingly, unless the defendant learned of the plaintiff's lawsuit and took one of the actions listed in MCR 2.306(A)(1)(a) to (d), the plaintiff must obtain leave of the court to engage in discovery with a nonparty to learn the defendant's identity. At this point, presented with a motion for leave

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[80] MCR 2.306(A)(1); MCR 2.307(A)(1).

[81] MCR 2.306(A)(1) (emphasis added).

[82] *Id*.

[83] *Vyletel-Rivard v Rivard*, 286 Mich App 13, 25; 777 NW2d 722 (2009).

[84] MCR 2.310(D)(1).

to conduct discovery, the trial court can apply the modified *Dendrite* standard. The trial court should grant the plaintiff permission to engage in discovery to learn the defendant's identity only if the plaintiff has made reasonable efforts to notify the defendant and, having withheld action to allow the defendant an opportunity to oppose the discovery request, has submitted evidence sufficient to withstand a motion for summary disposition, on a prima facie basis, under MCR 2.116(C)(10). In addition, the trial court must determine that the strength of the plaintiff's case and the necessity of the discovery of the defendant's identity outweigh the defendant's right to speak anonymously. If MCR 2.306 does not require a plaintiff to obtain leave of the court to take a deposition, either because the defendant was served with process or because the defendant took one of the actions listed in MCR 2.306(A)(1)(a) to (d), the plaintiff can serve the required discovery notice on the defendant and the defendant can move for a protective order, specifically asking that the discovery not be had.[85] At this point, presented with a motion for a protective order, the trial court can apply the modified *Dendrite* standard. Because the defendant already received notice of the requested discovery, the trial court should grant the requested protective order unless the plaintiff has produced sufficient evidence supporting each element of its cause of action on a prima facie basis, and the balancing test weighs in favor of the plaintiff.

## IV. CONCLUSION

I do not believe that Michigan law adequately protects a defendant's First Amendment right to speak anonymously when his or her identity is sought in a

[85] MCR 2.302(C)(1).

defamation action. Consequently, I would adopt a modified *Dendrite* standard to strike the appropriate balance between an anonymous defendant's First Amendment rights and a plaintiff's right to learn the defendant's identity in order to seek redress for alleged defamatory statements. Under this standard, a plaintiff alleging defamation may engage in discovery to learn an anonymous defendant's identity only after (1) the plaintiff has made reasonable attempts to notify the defendant and then has given the defendant a reasonable opportunity to defend against the discovery request, (2) the plaintiff has presented the trial court with prima facie evidence sufficient to support each element of its cause of action, other than the elements dependent on the defendant's identity, and (3) the strength of the plaintiff's prima facie case and the necessity of disclosure of the defendant's identity outweigh the defendant's right to speak anonymously. However, because Cooley has already learned Doe 1's identity, I concur with the majority that it is necessary to remand this case to the trial court for it to determine whether Doe 1 is entitled to a protective order to prevent further destruction of his anonymity.

PEOPLE v ELIASON

Docket No. 302353. Submitted January 9, 2013, at Grand Rapids. Decided April 4, 2013, at 9:05 a.m. Leave to appeal sought.

Dakotah W. Eliason was convicted by a jury in the Berrien Circuit Court of first-degree premeditated murder, MCL 750.316(1)(a), and possessing a firearm during the commission of a felony, MCL 750.227b(1), for fatally shooting his step-grandfather. The court, Scott Schofield, J., sentenced defendant, who was 14 years old when the crimes were committed, to life in prison without the possibility of parole. Defendant appealed.

The Court of Appeals *held*:

1. Defendant did not establish that he was denied the effective assistance of counsel. Defendant failed to overcome the presumption that counsel's decision to rebut the prosecution's evidence that he lacked remorse by impeaching the witnesses who testified to this effect and by highlighting evidence to the contrary rather than by presenting an expert witness was a matter of trial strategy. Defense counsel was also not ineffective by failing to object to the introduction of evidence that defendant had been reading about Charles Manson and had discussed capital punishment with a detective because it was relevant to show defendant's state of mind before and after the killing and was not unfairly prejudicial. Even if counsel should have objected to this evidence, defendant could not have established that prejudice resulted from its admission given the overwhelming evidence against him.

2. The trial court did not err by failing to suppress defendant's confessions to the police. The court's conclusion that defendant's waiver of his Fifth Amendment right against self-incrimination was knowing and intelligent was supported by the evidence that defendant appeared intelligent and articulate and twice told the detectives that he understood the nature of his rights. Further, a consideration of the additional safeguards for juveniles set forth in *People v Givans*, 227 Mich App 113 (1997), indicated that defendant's waiver was voluntary.

3. Defendant's mandatory sentence of life imprisonment without the possibility of parole constituted cruel and unusual punishment under *Miller v Alabama*, 567 US ___; 132 S Ct 2455 (2012)

and was therefore vacated. On remand for resentencing, in light of Michigan's first-degree-murder statutes, the court's discretion was limited to determining whether to impose a penalty of life imprisonment with or without the possibility of parole, and in making this decision, the trial court was to be guided by the nonexclusive list of factors set forth in *Miller* that apply when sentencing a juvenile for a homicide offense.

Convictions affirmed; sentence for the first-degree-murder conviction vacated; case remanded for resentencing.

Judge GLEICHER, concurring in part and dissenting in part, agreed with the result of the majority opinion, but wrote separately to express her belief that the Michigan Constitution forbade the trial court from resentencing defendant to imprisonment for life without the possibility of parole and that both the state and federal constitutions required the trial court to consider sentencing defendant to a term of years that would afford him a realistic opportunity for release.

1. CONSTITUTIONAL LAW — SENTENCING AND PUNISHMENT — HOMICIDE — JUVENILE OFFENDERS — CRUEL AND UNUSUAL PUNISHMENT.

Imposing a mandatory sentence of life imprisonment without the possibility of parole on a juvenile constitutes cruel and unusual punishment; when sentencing a juvenile for a homicide, a sentencing court must consider the factors that distinguish juveniles from adults generally and is to be guided by the following nonexclusive list of factors: (1) the character and record of the individual defendant and the circumstances of the offense, (2) the chronological age of the defendant, (3) the background and mental and emotional development of a youthful defendant, (4) the family and home environment, (5) the circumstances of the homicide offense, including the extent of the defendant's participation in the conduct and the way familial and peer pressure may have affected the defendant, (6) whether the defendant might have been charged with and convicted of a lesser offense if not for incompetencies associated with youth, and (7) the defendant's potential for rehabilitation (US Const, Am VIII; Const 1963, art 1, § 16; MCL 750.316[1][a]; MCL 769.1[1][g]; MCL 791.234[6][a]).

2. CONSTITUTIONAL LAW — SENTENCING AND PUNISHMENT — FIRST-DEGREE MURDER — JUVENILE OFFENDERS CRUEL AND UNUSUAL PUNISHMENT — SENTENCING DISCRETION.

When sentencing a juvenile convicted of first-degree murder, a trial court's discretion is limited to determining whether to impose a penalty of life imprisonment with or without the possibility of

parole (US Const, Am VIII; Const 1963, art 1, § 16; MCL 750.316[1][a]; MCL 769.1[1][g]; MCL 791.234[6][a]).

*Bill Schuette*, Attorney General, *John J. Bursch*, Solicitor General, *Arthur J. Cotter*, Prosecuting Attorney, and *Elizabeth A. Wild*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Jonathan Sacks*) for defendant.

Before: GLEICHER, P.J., and O'CONNELL and MURRAY, JJ.

MURRAY, J. Defendant appeals as of right his convictions for first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b(1). Defendant, who was 14 years old at the time he committed these crimes, was sentenced to mandatory life in prison without the possibility of parole for his first-degree murder conviction and two years' imprisonment for his felony-firearm conviction. We affirm defendant's convictions but remand for resentencing on his first-degree premeditated murder conviction in accordance with this opinion.

## I. FACTS

The material facts of this case were essentially undisputed, and at trial those facts revealed the following course of events. On March 5, 2010, defendant, along with his sister, went to spend the weekend at the home of Jean and Jesse "Papa" Miles, their grandmother and step-grandfather. Defendant often spent weekends at his grandparents' home. Jean described defendant as a "good grandson," and testified that she and Jesse had

always been involved in defendant's life. She explained that defendant had a "good" relationship with her and Jesse, and that nothing appeared to be out of the ordinary during this particular weekend.

On March 6, 2010, defendant's sister returned to their father's home while defendant remained at his grandparents' house. Jean saw defendant during the evening and briefly spoke with him when he came downstairs to use the restroom; defendant did not at the time appear angry or upset. At approximately 7:30 p.m. that evening, Jean went to her bedroom to watch television; Jesse was in the living room, where he slept, watching television. Defendant was in an upstairs bedroom.

Jean awoke at approximately 3:00 a.m. the next morning when she heard a "pop." Upon awakening, she heard defendant's voice, and thought defendant told her, "I shot Papa." The next thing she remembered was that she had a gun in her hands; she could not recall whether defendant gave her the gun or whether she picked it up. After discovering what happened, she instructed defendant to call 9-1-1, and paramedics responded to the call but were unable to save Jesse.

Michigan State Police Trooper Brenda Kiefer[1] and Deputy Eugene Casto of the Berrien County Sheriff's Department responded to the scene and arrested defendant. Kiefer initially interviewed defendant at the home; she read defendant his *Miranda*[2] warnings and defendant agreed to waive his rights and to speak to her without having a parent present.[3] Defendant told Kiefer

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[1] Kiefer's name appears in the trial transcripts as "Keifer."

[2] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] Kiefer described defendant as "respectful" during the interview. As to defendant's demeanor, Kiefer testified that defendant "was very matter

that late in the evening on March 6 or early in the morning on March 7, he went downstairs to get a handgun that Jesse kept on the hook of a coat rack. Afterwards, defendant went back up to his room and sat in a chair with the gun for approximately two to three hours. While he sat upstairs with the gun, defendant "was contemplating homicide or suicide." Defendant told Kiefer that he went downstairs and shot Jesse with the handgun while he was sleeping on the couch. Although defendant told Kiefer that he shot Jesse out of "sadness" and "pent up anger," he was not angry with Jesse or Jean, but instead was angry with his own parents.

Defendant also spoke with Casto on the night of his arrest as defendant sat in Casto's patrol car.[4] Among other things, defendant informed Casto that he neglected to tell Kiefer about two knives he had placed in the living room near the staircase, and that he realized that his "life just turned into Law & Order, but without commercials." Additionally, in referencing the killing, defendant stated, "[y]ou know I wish I could take it back but now I understand the feeling that people get when they do that. Now I understand how they feel." Continuing, defendant commented to Casto about the feeling, "when you hit that point of realization for that split second you feel like nothing could ever hurt you. Just for that split second. Once you realize what you've done." Defendant also described to Casto a paper his father, Steven Eliason, had written for a criminology class about various forms of execution.[5]

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of fact and showed no emotion or remorse for what happened. And he had a steady, calm voice when he answered all of my questions."

[4] The patrol car was equipped with a camera and defendant's statements to Casto were recorded and played for the jury at trial.

[5] According to Casto, during this conversation defendant "seemed basically kind of calm; [he] was not upset, [and he] didn't show any signs

Shortly thereafter, defendant was brought to a police station for interrogation by Detective Fabian Suarez. With everyone's permission, Eliason was present during some portions of the interview, but was not in the same room as defendant and Suarez for the entire interview. During the interview, Eliason and defendant acknowledged that they understood the *Miranda* warnings and defendant agreed to waive his rights. Defendant explained to Suarez that he had not slept much before the shooting, and that he shot Jesse after taking the loaded handgun from the coat rack. He could not explain why he shot Jesse, and indicated that Jesse never harmed him physically or emotionally. However, defendant indicated that he was contemplating either committing suicide or shooting Jesse that night, but decided to kill Jesse because he was not ready to die. And, in a sense admitting to a self-awareness of his actions, defendant stated that at one point he thought to himself, "what am I doing, why do I have to do this, why do I have the gun, I know better than this . . . ."

As to the shooting, defendant was in the living room looking at Jesse for approximately 45 minutes trying to decide what to do before he shot Jesse. Defendant then aimed the gun at Jesse from approximately seven feet away and pulled the trigger, shooting him in the head.[6] Defendant had not previously considered hurting Jesse, but "[s]omething snapped" that night because everything he had been thinking of that evening "just buil[t] up to the point that you don't know what you're doing."

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of remorse to me, didn't cry at all. [He] [w]as more inquisitive on what was going on than what may happen."

[6] Defendant told Suarez that he considered using knives rather than the gun because he was not sure whether he wanted the killing to be quiet or loud. Defendant also considered using either a pillow to smother Jesse or washcloths to gag him.

According to defendant he "blacked out for a couple minutes" before he shot Jesse.

With these essential facts in mind we now turn to defendant's challenges to his convictions and sentences.

## II. ANALYSIS

### A. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that he was denied the effective assistance of trial counsel because his trial counsel should have presented an expert witness to rebut testimony offered by the prosecution that he lacked remorse after the shooting. At a *Ginther*[7] hearing on this matter, Dr. James Henry testified that defendant experienced significant emotional trauma before the shooting and that this caused him to dissociate from reality. As a result, defendant often had trouble expressing his feelings, including remorse. Defendant contends that his trial counsel was ineffective for failing to call an expert witness, such as Dr. Henry, to explain his alleged lack of remorse.

A defendant is denied the effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution if "counsel's performance fell below an objective standard of reasonableness . . . [and] the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). This Court presumes that trial counsel was effective, and in order to show that counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's conduct constituted reasonable trial strategy. *People v*

[7] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

*Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). "An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Defendant cannot overcome the presumption that his trial counsel's decision not to call an expert witness was the product of trial strategy. Rather than calling an expert witness, defendant's trial counsel attempted to rebut the prosecution's arguments that defendant lacked remorse by impeaching witnesses who testified that defendant lacked remorse, and highlighting evidence that arguably showed defendant did have remorse. This Court will not second-guess trial counsel's strategy to rebut the evidence in this manner rather than calling an expert witness. *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). Just as importantly, we cannot conclude that defendant's trial counsel performed in an objectively unreasonable manner when the record reveals that he consulted with three mental health experts before trial, none of whom concluded that defendant's lack of remorse was caused by dissociation with reality. Although these experts evaluated defendant for purposes of raising an insanity defense or for mitigating the killing, they nonetheless concluded that defendant did not suffer from a mental health disorder. We cannot hold that trial counsel was constitutionally ineffective by not seeking out a fourth expert witness when the first three he consulted did not indicate that defendant suffered from an underlying mental health condition that caused him to appear to lack remorse for his actions. The record unequivocally shows that trial counsel thoroughly examined options regarding the use of expert witnesses and what, in the end, would be the best trial strategy. His performance

on behalf of defendant was anything but ineffective as defined by the Supreme Court.

However, defendant also argues that his trial counsel was ineffective for failing to object to irrelevant and prejudicial evidence, as well as the prosecutor's argument that utilized that evidence. Defendant notes that the prosecution introduced evidence—without objection from his counsel—of his conversation with Deputy Casto in which he espoused his views on capital punishment, and told Casto about a criminology paper his father had written that discussed various forms of execution.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "Alternatively stated, the general rule is that evidence is admissible if helpful in throwing light upon any material point in issue." *People v Murphy (On Remand)*, 282 Mich App 571, 580; 766 NW2d 303 (2009) (quotation marks and citation omitted). "A material fact is one that is 'in issue' in the sense that it is within the range of litigated matters in controversy." *Id*. (quotation marks and citation omitted). Pursuant to MRE 402, "[a]ll relevant evidence is admissible," unless it is otherwise deemed inadmissible. Here, defendant's statements to Casto were relevant to a matter in controversy because they tended to show defendant's state of mind prior to the killing. Given that the statements were made shortly after defendant shot Jesse, they were relevant to prove the issue of premeditation because they demonstrate that defendant considered the consequences of killing before he committed the murder. Those statements also showed that soon after the killing, defendant was able to clearly articulate thoughts, even about matters associated with killing and punishment.

Defendant's trial counsel was not ineffective for failing to raise a meritless objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant also contends that his trial counsel should have moved to exclude his statements to Casto under MRE 403 because the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. An analysis under MRE 403 requires balancing several factors, *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008), which include

> the time required to present the evidence and the possibility of delay, whether the evidence is needlessly cumulative, how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case, the potential for confusing or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects. [*Id*.]

The mere fact that evidence is damaging to a defendant does not make the evidence *unfairly* prejudicial. *Murphy (On Remand)*, 282 Mich App at 582-583.

In consideration of these factors, we conclude that any objection to defendant's statements about capital punishment under MRE 403 would have been unsuccessful. Although a slight danger existed that the jury might have been misled by comments about capital punishment, the evidence nonetheless tended to show that defendant acted with premeditation and the evidence was not particularly inflammatory. Therefore, trial counsel was not ineffective for failing to raise an objection to the evidence or to the prosecutor's argument as any such objections would have been meritless. *Ericksen*, 288 Mich App at 201. Relative to the prosecutor's reference to Charles Manson, although the prosecutor's question was irrelevant and his comments during closing arguments improper, defendant's trial

counsel's performance did not fall below an objective standard of reasonableness by failing to raise an objection. Defendant's trial counsel, as an experienced attorney, "was certainly aware that there are times when it is better not to object and draw attention to an improper comment." *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008) (quotation marks and citation omitted). "Furthermore, declining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy." *Id*.

Nevertheless, even if trial counsel acted in an objectively unreasonable manner by failing to object to this evidence, defendant would not be entitled to relief because he cannot demonstrate prejudice. *Carbin*, 463 Mich at 600. Indeed, even if this evidence had been excluded, the prosecution presented overwhelming evidence of defendant's guilt. The prosecution introduced evidence that defendant admitted to pondering the killing for approximately two to three hours, and that he sat in the living room next to Jesse for approximately 45 minutes as he contemplated what to do. Further, defendant told police officers that he pondered whether to use knives, a gun, or even a pillow. Given the amount of contemplation and planning by defendant, there is overwhelming evidence that he had more than a "sufficient time to . . . take a second look" and that he was guilty of first-degree premeditated murder. *People v Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011) (quotation marks and citation omitted).

### B. WAIVER OF DEFENDANT'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION

Defendant also challenges the trial court's failure to suppress his confessions to Kiefer and Suarez because,

although he waived his Fifth Amendment rights[8] before giving his confessions, his waivers were neither knowing nor voluntary. Defendant preserved this issue for appeal by challenging the admissibility of his statements in a pretrial motion. *Unger*, 278 Mich App at 243. "We review de novo a trial court's determination that a waiver was knowing, intelligent, and voluntary." *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010). However, we defer to the trial court's factual findings so long as they are not clearly erroneous. *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001). "[T]he analysis must be bifurcated, i.e., considering (1) whether the waiver was voluntary, and (2) whether the waiver was knowing and intelligent." *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). Whether a waiver is knowing and intelligent "requires an inquiry into [a] defendant's level of understanding, irrespective of police conduct." *Gipson*, 287 Mich App at 265. "A defendant does not need to understand the consequences and ramifications of waiving his or her rights. A very basic understanding of those rights is all that is necessary." *Id*. Meanwhile, whether the waiver was voluntary depends on the absence of police coercion; the defendant's waiver must be his or her own "free and deliberate choice," rather than the product of intimidation. *Id*. at 264-265.

Initially, we conclude that record evidence supported all of the trial court's findings, so we use those facts in analyzing the legal issues presented. In doing so, we hold that defendant knowingly and intelligently waived his right against self-incrimination after his *Miranda*

[8] The warnings required by *Miranda* do not grant independent rights to defendant. Rather, *Miranda* warnings are measures taken to provide "practical reinforcement" of a defendant's Fifth Amendment rights. *Michigan v Tucker*, 417 US 433, 444; 94 S Ct 2357; 41 L Ed 2d 182 (1974).

warnings because the totality of the circumstances demonstrates that defendant understood his rights. Kiefer and Suarez testified that defendant appeared intelligent and articulate and that he twice stated he understood the nature of his rights. Although defendant was only 14 years old, the record reveals that he performed well in school. Additionally, the trial court rejected defendant's testimony at the suppression hearing that he did not understand his rights, finding that defendant was not credible as he was unable to articulate exactly what he did not understand about his rights. We defer to the trial court's credibility determinations. *Gipson*, 287 Mich App at 264. Because the trial court found that defendant appeared intelligent and articulate and that he twice indicated he understood his rights, we cannot hold that his waiver was not knowing and intelligent. See *People v Abraham*, 234 Mich App 640, 649-650; 599 NW2d 736 (1999); *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

We likewise reject defendant's argument that his waivers were involuntary. The voluntariness of a *Miranda* waiver is evaluated under a totality of the circumstances test, but also includes additional safeguards for juveniles. *In re SLL*, 246 Mich App 204, 209; 631 NW2d 775 (2001); *People v Givans*, 227 Mich App 113, 121; 575 NW2d 84 (1997). In *Givans*, 227 Mich App at 121, this Court explained that the trial court must consider extra factors in deciding whether a juvenile's waiver was voluntary:

> (1) whether the requirements of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), have been met and the defendant clearly understands and waives those rights, (2) the degree of police compliance with MCL 764.27; MSA 28.886 and the juvenile court rules, (3) the presence of an adult parent, custodian, or guardian, (4) the juvenile defendant's personal background, (5) the ac-

> cused's age, education, and intelligence level, (6) the extent of the defendant's prior experience with the police, (7) the length of detention before the statement was made, (8) the repeated and prolonged nature of the questioning, and (9) whether the accused was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention.

Considering the factors articulated in *Givans*,[9] and keeping in mind the deference we give to the trial court's findings of fact, we hold that defendant voluntarily waived his Fifth Amendment rights before he spoke with Kiefer and Suarez. Regarding the first factor, the officers complied with *Miranda*'s requirements and defendant understood his *Miranda* rights.[10] As to the third factor, Eliason was present during defendant's interview with Suarez, and although he was not present during defendant's interview with Kiefer, that was at defendant's request.

Likewise, we find nothing in the next three factors—defendant's background, age, education, intelligence, and the extent of his prior experience with the police—to suggest that defendant's waiver was involuntary. Kiefer described defendant as "intelligent and articulate," and Suarez opined that defendant was "probably above average [intelligence] for his age . . . ." Additionally, the record reveals that defendant earned mostly A's and B's in school, and that he did not have difficulty understanding the police officers who interviewed him. Further, defendant had some familiarity with the police as a result of prior questioning by police officers on another occasion.

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[9] When rendering its decision on defendant's motion to suppress, the trial court thoroughly examined all of these factors.

[10] Defendant does not challenge the second *Givans* factor, compliance with MCL 764.27.

The remaining three factors—the length of the detention, the nature of the questioning, and whether defendant was coerced, threatened, or deprived of food, water, sleep, or medical attention—also support the conclusion that defendant's waivers were voluntary. Neither the detention nor the questioning in this case was prolonged, as defendant confessed to Kiefer almost immediately after he was arrested. His subsequent confession to Suarez followed approximately two hours later. Moreover, there is no indication in the record, nor does defendant allege, that Kiefer or Suarez coerced or threatened him into making a confession and waiving his rights. Although defendant notes that he had not slept for a considerable amount of time before the interviews, the officers testified that defendant was articulate and that he did not have difficulty answering their questions. Accordingly, in light of each of the factors noted above, we hold that defendant's waivers were voluntary. See *Givans*, 227 Mich App at 122; *People v Good*, 186 Mich App 180, 189; 463 NW2d 213 (1990).[11]

### C. CRUEL AND UNUSUAL PUNISHMENT

Defendant's final argument[12] is that his mandatory sentence of life imprisonment without the possibility of

[11] Additionally, we reject defendant's contention that Eliason exerted pressure on him and coerced him into confessing to Suarez. The record reveals that defendant confessed to Suarez at the outset of the interview; Eliason did not speak with defendant or ask him any questions until after defendant already confessed. Any claim that Eliason forced defendant to confess is disingenuous.

[12] We note that defendant initially argued that he was entitled to a new trial because the trial court violated his right to due process by shackling him at trial. Defendant expressly abandoned this issue after the prosecution presented evidence at a posttrial evidentiary hearing that none of the jurors saw defendant's shackles.

parole is cruel and unusual punishment under US Const, Am VIII and Const 1963, art 1, § 16. At sentencing, the trial court imposed a mandatory sentence of life without the possibility of parole pursuant to MCL 750.316(1), MCL 769.1(1)(g), and MCL 791.234(6)(a). Defendant preserved this issue by raising it at his sentencing hearing. *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). "This Court reviews constitutional questions de novo." *People v Dipiazza*, 286 Mich App 137, 144; 778 NW2d 264 (2009).

In *Miller v Alabama*, 567 US ___; 132 S Ct 2455, 2469; 183 L Ed 2d 407 (2012), the United States Supreme Court ruled "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."[13] The *Miller* Court noted that juveniles and adults are different for purposes of sentencing, and explained that sentencing schemes that *mandate* life without parole for juveniles convicted of homicide offenses do not take into account a juvenile's individual characteristics and thus are unconstitutional. *Id*. at ___; 132 S Ct at 2466-2469. The Court added:

> [T]he mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes . . . [the] foundational principle [found in *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010), and *Roper v Simmons*, 543 US 551; 125

[13] The Eighth Amendment of the United States Constitution provides the following guarantees: "Excessive bail shall not be required, not excessive fines imposed, nor cruel and unusual punishments inflicted." US Const, Am VIII.

> S Ct 1183; 161 L Ed 2d 1 (2005)]: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children. [*Id*. at ___; 132 S Ct at 2466.]

In *People v Carp*, 298 Mich App 472, 526-527; 828 NW2d 685 (2012) this Court explained that the limited holding in *Miller* was that a juvenile cannot be *automatically* subjected to a punishment of life imprisonment without the possibility of parole. The holding of *Carp*, however, was that *Miller* did not apply retroactively to collateral challenges to sentences. *Id*. at 522. Here, defendant's case was pending on direct review at the time *Miller* was decided; therefore, *Miller* applies and defendant's mandatory sentence of life imprisonment without the possibility of parole constitutes cruel and unusual punishment under the Eighth Amendment. *Id*.

However, contrary to defendant's assertions, he is not entitled to a remand at which the trial court has unfettered discretion to impose a sentence for any term of years. In fact, he could still receive the same sentence on remand, as the *Miller* Court did not "foreclose a sentencer's ability" to sentence a juvenile in a homicide case to life imprisonment without parole, so long as the sentence "take[s] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id*. at ___; 132 S Ct at 2469. In other words, a trial court can still sentence a juvenile who committed a homicide to life in prison without the possibility of parole, so long as that sentence is an individualized one that takes into consideration the factors outlined in *Miller*. *Id*. at ___; 132 S Ct at 2466-2467, 2471. We recognized as much in *Carp*, 298 Mich App at 525, where we opined in dicta that the rule from *Miller* "does not . . . imply that a sentencing court has unfettered discretion when sen-

tencing a juvenile. Rather, the focus is on the discretion of the sentencer to determine whether to impose the harshest penalty of life without the possibility of parole on a juvenile convicted of a homicide offense."

Therefore, the only discretion afforded to the trial court in light of our first-degree murder statutes and *Miller* is whether to impose a penalty of life imprisonment without the possibility of parole or life imprisonment with the possibility of parole. *Carp*, 298 Mich App at 527. In deciding whether to impose a life sentence with or without the possibility of parole, the trial court is to be guided by the following nonexclusive list of factors:

> (a) the character and record of the individual offender [and] the circumstances of the offense, (b) the chronological age of the minor, (c) the background and mental and emotional development of a youthful defendant, (d) the family and home environment, (e) the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressure may have affected [the juvenile], (f) whether the juvenile might have been charged [with] and convicted of a lesser offense if not for incompetencies associated with youth, and (g) the potential for rehabilitation. [*Id*. at 532, citing *Miller*, 567 US at ___; 132 S Ct at 2467-2468 (quotation marks and citations omitted).]

As the prosecutor has noted, under MCR 6.425(E)(1), a trial court is already required to hold a sentencing hearing, and so this remedy—rather than the one suggested by defendant[14]—is expressly permitted by

[14] Defendant proposes that the most palatable remedy consistent with the role of the judiciary is to vacate his first-degree murder conviction and remand for entry of a second-degree murder conviction, which allows for a term-of-years sentence. However, the cases defendant relies upon provide that specific remedy when the conviction was not based on sufficient facts for the higher charged crime. That is not what we are

court rule and is not an unconstitutional trip by the judiciary into the legislative realm. We therefore vacate defendant's mandatory sentence of life without the possibility of parole and remand for an individualized sentence within the strictures of *Miller*.

Our dissenting colleague is of the opinion that (1) under the federal constitution as interpreted in *Miller* a trial court has complete freedom to resentence a juvenile to any sentence, except those actually provided for by the Legislature, and (2) that a sentence of life *with* the possibility of parole is cruel or unusual punishment under Const 1963, art 1, § 16. With all due respect, we explain below why we disagree with these propositions.

### 1. *MILLER* AND THE SEPARATION OF POWERS

The dissent argues that our application (consistent with the dicta of *Carp*) of *Miller*'s holding—i.e., that the appropriate sentencing remedy is to remand for a life sentence, with the trial court exercising discretion as to whether the sentence should be with or without the possibility of parole—is too narrow. Instead, relying on *Miller*, the dissent would create a rule providing trial courts with the "discretion to fashion a sentence that takes into account an offender's youth . . . ." Essentially the dissent would give unfettered discretion (except for use of *Miller*'s criteria) to trial courts when sentencing juveniles lawfully convicted of first-degree premeditated murder. But in coming to this conclusion, the dissent has failed to heed (1) the actual holding of *Miller*, (2) the context in which *Miller*'s ruling was made, and (3) the Michigan Legislature's judgment of the appropriate punishment for first-degree murderers.

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faced with here, as overwhelming facts supported the first-degree-murder conviction. To do as suggested by defendant would require us to ignore the jury findings and the prosecutor's charging discretion.

There is no disagreement that *Miller* provides the precedent for addressing whether defendant's current sentence—one that was mandatorily imposed—is constitutionally valid under the federal constitution. But precedent, of course, has its limitations. As one court has accurately stated:

> The essence of the common law doctrine of precedent or *stare decisis* is that the rule of the case creates a binding legal precept. The doctrine is so central to Anglo-American jurisprudence that it scarcely need be mentioned, let alone discussed at length. A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy. [*Allegheny Gen Hosp v NLRB*, 608 F2d 965, 969-970 (CA 3, 1979) abrogated on other grounds *St Margaret Mem Hosp v NLRB*, 991 F2d 1146 (CA 3, 1993) (footnote omitted).]

At the outset of her opinion, Justice Kagan made clear the holding in *Miller*: "We . . . hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " *Miller*, 567 US at ___; 132 S Ct at 2460.[15] That holding was necessarily limited by the fact that the Court was reviewing the validity of statutes enacted in Alabama and Arkansas that *required* the sentence of life without the possibility of parole without a trial court considering *any* factors unique to the defendant

[15] Though the limited nature of the *Miller* holding is abundantly clear, we point out that numerous other state courts have recently made the same observation as we do today. See, e.g., *Conley v State*, 972 NE2d 864, 879 (Ind, 2012); *State v Williams*, 108 So3d 1169 (La, 2013); *State v Riley*, 140 Conn App 1, 13-16; 58 A3d 304 (2013) lv gtd in part 308 Conn 910 (2013).

and his crime. Justice Kagan was equally specific when she declared for the Court that it was not invalidating discretionary life-without-parole sentences imposed on juveniles convicted of murder: "Because that holding is sufficient to decide these cases, we do not consider . . . [the] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger." *Id.* ___; 132 S Ct at 2469. Importantly, the *Miller* Court did not strike down the statutes in their entirety, but instead merely ruled that their mandatory nature violated the Eighth Amendment when applied to juveniles.

As a result of *Miller*'s limited holding, the state statutes under which the trial court sentenced defendant to life in prison without the possibility of parole—MCL 750.316(1)(a), MCL 769.1(1)(g), and MCL 791.234(6)(a)—cannot on remand *mandate* the same sentence. Instead, the trial court is required to consider the factors surrounding defendant's age when exercising the discretion to determine whether the same sentence should be imposed again. *Miller* requires nothing more, and certainly did not invalidate the Michigan Legislature's judgment that a life sentence is the appropriate punishment for a juvenile who is lawfully convicted of first-degree murder.[16]

Contrary to the dissent's view, the *Miller* Court's recitation of factors it considered relevant to youth did

[16] It is true, as the dissent states, that no statute provides life with parole as a punishment for first-degree murder. However, life in prison without parole is still the legislatively prescribed punishment for this most heinous crime, and can still be the sentence for a juvenile. But, as we have exhaustively discussed, *Miller* requires discretion when determining whether a juvenile should be sentenced to this most severe penalty. If a juvenile should not receive life without parole, certainly life with parole is the sentence most consistent with the Legislature's declared punishment.

not create a new mandatory sentencing guideline in place of sentencing statutes like those at issue here. Rather, because it was addressing whether *mandatory* life in prison without the possibility of parole was constitutional, the *Miller* Court recited factors that distinguish juveniles from adults both as evidence of what important factors could not be considered under these mandatory schemes and to provide guidance to lower courts when determining if "a State's most severe penalties on juvenile offenders" should be imposed:

> But the *mandatory penalty schemes* at issue here prevent the sentencer from taking account of these central considerations. *By removing youth from the balance*—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—*these laws* prohibit a sentencing authority from assessing whether the *law's harshest term of imprisonment* proportionately punishes a juvenile offender. That contravenes *Graham's* (and also *Roper's*) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children. [*Miller*, 567 US at ___; 132 S Ct at 2466 (emphasis added).]

See, also, *id*. at ___; 132 S Ct at 2467 ("Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it."). We reemphasize, then, by repeating that *Miller* did "not foreclose a sentencer's ability to make that judgment [life without parole] in homicide cases," but instead merely required sentencing courts "to take into account how children are different, and how those differences counsel against *irrevocably* sentencing them to a lifetime in prison." *Id*. at ___; 132 S Ct at 2469 (emphasis added).

The dissent fails to acknowledge this specific holding, and the context within which the *Miller* Court reached

it. Yes, the factors that come into play when sentencing juveniles are important, but *Miller* only requires those to be considered when the juvenile is convicted of murder *and* the state's "most severe penalty" is being considered, i.e., life without the possibility of parole. Just last month the Wyoming Supreme Court, in *Bear Cloud v State*, 2013 Wy 18, ¶ 44; 294 P3d 36, 47 (Wy, 2013), recognized this same point:

> In sum, *Miller* requires an individualized sentencing hearing for every juvenile convicted of first-degree murder at which the sentencing court must consider the individual, the factors of youth, and the nature of the homicide in determining whether to order a sentence that includes the possibility of parole. *Miller* does not guarantee the possibility of parole for a convicted juvenile homicide offender, but *Miller* does mandate that a meaningful review and consideration be afforded by the sentencing court.

The *Miller* Court was unquestionably *not* offering these factors so that courts could fashion *any* sentence for a juvenile, which is made clear by the limited holding and issue before that Court.

But that is what is urged by the dissent, and in doing so it is stretching *Miller* well beyond the precedent that it established. Perhaps granting trial courts wide discretion in sentencing a juvenile would be good policy (though we certainly offer no opinion on that subject), but as of today Michigan law—in conjunction with *Miller*—is clear as to what sentences can be imposed upon a juvenile for a first-degree-murder conviction. If a different policy decision is to be made regarding the appropriate sentences for juveniles convicted of murder, it is best "to allow the legislative process to work than to engage in an expansive and unnecessary interpretation of *Miller*." *State v Riley*, 140 Conn App 1, 15 n 8; 58 A3d 304 (2013), lv gtd in part 308 Conn 910 (2013). Again, *Miller* unquestionably did *not* invalidate state

statutes when construed (pursuant to *Miller*) to *allow* first-degree murderers to be sentenced to life in prison without parole, and so we must continue to enforce our Legislature's policy choice in that regard, see *Davis v Detroit Financial Review Team*, 296 Mich App 568, 628-629; 821 NW2d 896 (2012) (O'CONNELL, J., concurring in part and dissenting in part) (recognizing the inherent limitations on the judiciary under the separation of powers).

2. THE STATE CONSTITUTION

Defendant and the dissent also argue that a sentence of life in prison with *or without* the possibility of parole runs afoul of our state constitution's prohibition against "cruel or unusual punishment[.]" Const 1963, art 1, § 16. It is certainly true that this state provision, with the use of "or" rather than the Eighth Amendment's prohibition containing "and," has been interpreted more broadly than the federal prohibition. *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992).[17] However, because it is unknown what sentence on remand will be imposed upon defendant, and for what reasons, it is best to leave this issue to another day. See *People v Oswald (After Remand)*, 188 Mich App 1, 12-13; 469 NW2d 306 (1991). Nevertheless, because

[17] We note that the *Bullock* Court's use of a proportionality analysis for determining whether a sentence constitutes cruel or unusual punishment was eloquently challenged in a dissent written by Justice RILEY, see *Bullock*, 440 Mich at 46-67, and has been more recently called into question on those same grounds. *People v Correa*, 488 Mich 989, 989-992 (2010) (MARKMAN, J., joined by YOUNG and CORRIGAN, JJ., concurring). The issues raised by Justice RILEY address what is the required test under Const 1963, art 1, § 16. No one questions the principle that the Michigan Constitution trumps an inconsistent statute, or that the judiciary is empowered to declare when such a conflict exists. *Marbury v Madison*, 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803).

the dissent has gone to great lengths in addressing this issue, we feel compelled to offer a few comments on the subject.

Our dissenting colleague concludes, based primarily on *Bullock* and *People v Lorentzen*, 387 Mich 167; 194 NW2d 827 (1972), that the Michigan Legislature cannot constitutionally set the punishment of life in prison with or without the possibility of parole for a juvenile convicted of first-degree murder. To reach this result, the dissent employs the vague and subjective proportionality tests set forth in those cases, while failing to note caselaw that tends to preclude the conclusion reached.

For example, it is well settled that "[l]egislatively mandated sentences are presumptively proportional and presumptively valid." *People v Brown*, 294 Mich App 377, 390; 811 NW2d 531 (2011). Nowhere does the dissent mention these constitutionally important presumptions. Likewise, how can it be that our state constitution prohibits a sentence for a juvenile of life *with* parole when our Supreme Court has held that life *without* parole is constitutional for the crimes of felony-murder and conspiracy to commit murder? See *People v Hall*, 396 Mich 650, 657-658; 242 NW2d 377 (1976) and *People v Fernandez*, 427 Mich 321, 335; 398 NW2d 311 (1986). One reason why the *Hall* Court rejected the state constitutional challenge was because defendant had not shown that "Michigan's punishment for felony murder is widely divergent from any sister jurisdiction." *Hall*, 396 Mich at 658. Nowhere does the dissent address this relevant factor.[18] See *Bullock*, 440 Mich at 33-34 (recognizing under *Lorentzen* that how other

[18] *Miller* recognized, however, that 29 jurisdictions (28 states and the federal government) provided life *without* parole for some juveniles convicted of murder. *Miller*, 567 US at ___; 132 S Ct at 2471.

states penalize the conduct must be considered in the proportionality analysis); *Brown*, 294 Mich App at 390 (how other states penalize similar conduct must be considered in the state constitutional analysis); *People v Launsburry*, 217 Mich App 358, 363; 551 NW2d 460 (1996) (same). Finally, our Supreme Court in *People v Lemons*, 454 Mich 234, 258-259; 562 NW2d 447 (1997), rejected an argument that an offender's young age, by itself, renders a particular sentence disproportionate.[19]

It is apparent that the dissent believes that it is immoral to punish a juvenile for murder with a life sentence, even when given the chance of parole. As explained earlier, the *Miller* Court failed to invalidate *all* juvenile life sentences with no chance of parole, and failed to address juvenile life sentences *with* the opportunity for parole. Moreover, no Michigan Supreme Court case has held such a sentence unconstitutional. Accordingly, the dissent's argument turns solely on policy[20] and an overly broad reading and application of *Miller* and *Bullock*.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

O'CONNELL, J., concurred with MURRAY, J.

GLEICHER, P.J. (*concurring in part and dissenting in part*). I concur with the result reached by the majority regarding defendant Dakotah Eliason's challenges to

[19] The proportionality analysis is made at the time the defendant is sentenced, so what the parole board may do some years down the road, or even what rules and regulations are in place when a defendant is later considered for parole, is merely speculative at the time of sentencing.

[20] And, as we emphasized earlier, those policy decisions are constitutionally left to debate within the halls of the Legislature. *Curry v Meijer, Inc*, 286 Mich App 586, 599; 780 NW2d 603 (2009).

his first-degree-murder conviction. I write separately to respectfully express my belief that the Michigan Constitution forbids the trial court from resentencing Dakotah to imprisonment for life without the possibility of parole. Furthermore, because Michigan's parole guidelines do not take into account Dakotah's youth at the time he committed the crime, I believe that both the United States and Michigan Constitutions mandate that the trial court consider sentencing Dakotah to a term of years that affords him a realistic opportunity for release.

## I. THE EIGHTH AMENDMENT, PROPORTIONALITY, AND JUVENILE OFFENDERS

The Eighth Amendment of the United States Constitution embodies the basic precept that punishment for crime should be proportioned to both the offender and the offense. *Miller v Alabama*, 567 US ___; 132 S Ct 2455, 2463; 183 L Ed 2d 407 (2012). "The concept of proportionality is central to the Eighth Amendment." *Graham v Florida*, 560 US 48; 130 S Ct 2011, 2021; 176 L Ed 2d 825 (2010). Applying proportionality principles, the Supreme Court held in *Miller* that a mandatory sentence of life imprisonment without the possibility of parole violates the Eighth Amendment's prohibition of "cruel and unusual punishments" when imposed on an offender who had not reached the age of 18 at the time of his crime. *Miller*, 567 US at ___; 132 S Ct at 2469.

*Miller*'s holding flows from two precedential strands of Eighth Amendment jurisprudence: "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty," *Miller*, 567 US at ___; 132 S Ct at 2463, and the requirement "that sentencing authorities consider the characteristics of a defendant and the details of his

offense before sentencing him to death" *id*. at ___; 132 S Ct at 2463-2464. "[T]he confluence of these two lines of precedent," the Supreme Court explained, "leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Id*. at ___; 132 S Ct at 2464.

The "categorical ban" authorities cited by the Supreme Court, *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005), and *Graham*, 560 US 48, "establish that children are constitutionally different from adults for the purposes of sentencing." *Miller*, 567 US at ___; 132 S Ct at 2464. Recklessness, impulsivity, and thoughtlessly engaging in risk-taking behaviors are but three unpleasant hallmarks of adolescent behavior. These characteristics of youth render children "less culpable than adults[.]" *Graham*, 560 US at ___; 130 S Ct at 2028 (quotation marks and citation omitted). Accordingly, a convicted defendant's age figures prominently in the Eighth Amendment's proportionality analysis. *Miller*, 567 US at ___; 132 S Ct at 2465-2466.

Because "youth matters" in determining whether lifetime incarceration without the possibility of parole is warranted, "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Id*. at ___; 132 S Ct at 2465-2466 (quotation marks and citation omitted). Thus, mandatory penalty provisions contravene the fundamental constitutional principle "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id*. at ___; 132 S Ct at 2466. Likening life-without-parole sentences to the death penalty, the Supreme Court reasoned that juveniles convicted of homicide must be sentenced individually and in a manner that recognizes "the mitigating

qualities of youth." *Id*. at ___; 132 S Ct at 2467 (quotation marks and citation omitted). The Supreme Court elaborated:

> [M]andatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile . . . will receive the same sentence as the vast majority of adults committing similar homicide offense—but really, as *Graham* noted, a *greater* sentence than those adults will serve. [*Id*. at ___; 132 S Ct at 2467-2468.]

Juveniles convicted of even the most serious offenses may redeem themselves in prison and thereby demonstrate an ability to rejoin society as productive members. For this reason, the Eighth Amendment requires that states provide " 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' " *Id*. at ___; 132 S Ct at 2469, quoting *Graham*, 560 US at ___; 130 S Ct at 2030. And although the Supreme Court refused to "foreclose a sentencer's ability" to impose on a juvenile a punishment of life without parole, the Court emphasized that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Miller*, 567 US at ___; 132 S Ct at 2469.

The majority recognizes that *Miller* sets forth a new constitutional rule governing the process of sentencing juveniles convicted of first-degree murder in Michigan. Citing this Court's opinion in *People v Carp*, 298 Mich App 472; 828 NW2d 685 (2012), the majority holds that Dakotah is entitled to resentencing following a hearing after which the trial court must impose a sentence of

either life without the possibility of parole, or life imprisonment with the possibility of parole. According to dicta contained in *Carp* and adopted by the majority, *Miller* "does not . . . imply that a sentencing court has unfettered discretion when sentencing a juvenile. Rather, the focus is on the discretion of the sentencer to determine whether to impose the harshest penalty of life without the possibility of parole on a juvenile convicted of a homicide offense." *Id*. at 525.

In accordance with *Carp*, the majority circumscribes Dakotah's sentence alternatives to life imprisonment without parole or life imprisonment with parole. The majority predicates this rule on "the Michigan Legislature's judgment that a life sentence is the appropriate punishment for a juvenile who is lawfully convicted of first-degree murder." Contrary to *Carp* and the majority, *Miller* mandates that a sentencing court retain discretion to fashion an individualized sentence that takes into account an offender's youth and "distinctive (and transitory) mental traits and environmental vulnerabilities," and also affords young offenders a "meaningful opportunity to obtain release." *Miller*, 567 US at ___, ___; 132 S Ct at 2465, 2469 (quotation marks and citation omitted). The sentencing calculus crafted by *Carp* violates *Miller* because it eliminates individualized sentencing and (as *Carp* concedes) it forecloses any meaningful opportunity for a reformed juvenile to obtain his or her freedom.

Furthermore, while professing fidelity to legislative sentencing judgments, the majority (and *Carp*) fail to identify any statutory provision permitting a trial court to sentence a defendant convicted of first-degree murder to life imprisonment with the possibility of parole. Our Legislature has defined only one sentence for first-degree murder, and that sentence simply does not contemplate life with parole.

The majority insists that *Miller* requires that when resentencing juveniles, judges must apply the legislative "policy choice" most consistent with life without parole. I find nothing in *Miller* even remotely consistent with this view. To the contrary, *Miller* holds that proportionality principles must guide juvenile sentencing, and that laws that disregard the characteristics of youth are flawed. *Miller*, 567 US at ___; 132 S Ct at 2465-2466. Moreover, the majority's newly created life-sentence option is no more tethered to Michigan's legislative sentencing scheme than a term-of-years sentence. Absent any legislatively approved sentence for first-degree murder other than life without parole, the real question is whether affording a sentencing court the ability to impose a term-of-years sentence is required to fulfill *Miller*'s mandate. In my view, only this option permits an individualized sentence and offers a juvenile " 'some *meaningful* opportunity to obtain release.' " *Miller*, 567 US at ___; 132 S Ct at 2469 (citation omitted; emphasis added).

Furthermore, article 1, § 16 of the Michigan Constitution precludes sentencing Dakotah to life imprisonment. Michigan's constitutional prohibition of cruel or unusual punishment incorporates a proportionality analysis emphasizing evolving sentencing standards "enlightened by a humane justice," and focusing on rehabilitation rather than retribution. *People v Lorentzen*, 387 Mich 167, 178, 179-181; 194 NW2d 827 (1972) (quotation marks and citation omitted). Measured against this framework, a life sentence with or without the possibility of parole exceeds constitutional bounds.

## II. THE EIGHTH AMENDMENT, JUVENILE OFFENDERS, AND MICHIGAN'S SENTENCING SCHEME

In *Carp*, this Court elected to "provide guidance" to courts that would in the future sentence juveniles

convicted of first-degree murder, despite that the sole issue presented was whether *Miller* applied retroactively. *Carp*, 298 Mich App at 523. In dicta adopted uncritically by the majority, *Carp* limited sentencing courts' range of options to life imprisonment with parole, or life without parole. *Id*. at 527. *Carp* based this commandment on its own determination that "[i]t would . . . be inconsistent to sentence juveniles who commit murder to a sentence that is not proportional to the severity of the crime." *Id*. at 528.

This new rule is incorrect for two reasons. First, it ignores the United States Supreme Court's admonition in *Miller*, *Graham*, and *Roper* that a youthful offender's sentence must be proportioned *to the offender* as well as the offense. While an automatic life sentence may be proportionate to the crime of murder, a life sentence may not be imposed on a juvenile absent meaningful consideration of whether such punishment fits the *juvenile criminal*. *Carp*'s prescription—life with or without parole—nullifies the "foundational principle[] that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."[1] *Miller*, 567 US at ___; 132 S Ct at 2466.

Pursuant to *Miller*'s core proportionality principles, an offender's age possesses special relevance that necessarily factors prominently in a sentencing calculation.

[1] *Carp*'s conclusion that juveniles who commit murder deserve a life sentence because only a life sentence is proportionate to that crime disregards that just as all juveniles are not alike, neither are all murders. Kuntrell Jackson, one of the *Miller* defendants, had not fired the bullet that killed the victim and did not intend her death. He was convicted solely as an aider and abettor. *Miller*, 567 US at ___; 132 S Ct at 2468. These mitigating circumstances "go to Jackson's culpability for the offense." *Id*. Thus, sentencing a juvenile convicted of first-degree murder to life imprisonment without parole may sometimes qualify as inconsistent with substantial justice. Ultimately, that question is for a sentencing court to decide, not the Michigan Court of Appeals.

*Id*. at ___; 132 S Ct 2469. *Miller* instructs that because "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole," sentencing courts must consider "the background and mental and emotional development" of each individual youthful offender before passing sentence. *Id*. at ___, ___; 132 S Ct at 2465, 2467 (quotation marks and citation omitted). In other words, *Miller* compels a sentencing court to tailor punishment to an offender's *personal* responsibility and *singular* moral guilt. To comply with *Miller*, a judge must bear in mind that children under age 18 are "categorically less culpable," *Roper*, 543 US at 567 (quotation marks and citation omitted), and more amenable to rehabilitation than adults who commit the same crimes. A sentencing scheme that forecloses sentencing proportionate to a child's culpability violates *Graham*, *Roper*, and *Miller*.

For this reason, *Carp*'s circumscription of sentence options to either of two life terms cannot be reconciled with *Miller*'s central teaching: children are constitutionally unique. Judges sentencing children must consider the mitigating effects of youth and the specific circumstances of their crimes. These factors may counsel strongly against a life term, either with or without the possibility of parole. A sentencing rubric that fails to permit proportional and individualized mitigation does not pass constitutional muster.

In light of the "diminish[ed] . . . penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes," *Miller*, 567 US at ___; 132 S Ct at 2465, different sentencing principles apply. Despite that Michigan law demands that an adult murderer serve a mandatory life sentence, *Miller* obligates sentencing courts to exercise meaningful discretion when sentencing a child who

committed that same crime. Exercising discretion involves thoughtfully considering "the wealth of characteristics and circumstances attendant to" a defendant's youth, *id*. at ___; 132 S Ct at 2467, which in turn means that a court must be permitted to reject that a child deserves to serve a life term. In my view, the exercise of discretion contemplated in *Miller* is simply inconsistent with a rule allowing only for life imprisonment with or without parole. The "two-sizes-fit-all" approach embraced by *Carp* offends the Eighth Amendment because it forecloses proportionality.[2]

I respectfully take issue with *Carp* for a second reason. In *Carp*, this Court acknowledged that a parolable life sentence likely results in lifetime imprisonment. *Carp*, 298 Mich App at 533-535.[3] This reality compels the conclusion that a sentence of life with parole is just as final as one that denies the possibility of parole at the outset. Although *Carp* urges that the Parole Board provide "a meaningful determination and review when parole eligibility arises," *id*. at 536, *Miller* instructs that removing youth from the balance *at the time of sentencing* contravenes the Eighth Amendment by prohibiting a judge "from assessing whether the

[2] Like the California Court of Appeal, I believe that a "presumptive penalty" of life imprisonment cannot be "constitutionally square[d]" with *Miller*. *People v Siackasorn*, 211 Cal App 4th 909, 912; 149 Cal Rptr 3d 918 (2012) lv gtd 154 Cal Rptr 3d 73 (2013). In *Siackasorn*, the court held that a sentencing judge has "equal discretion to impose" either life without parole or the 25-years-to-life penalty permitted by a California statute. *Id.* Michigan lacks a complementary statutory provision. But that hardly means that a sentencing court has "unfettered" discretion to sentence a juvenile convicted of first-degree murder. A sentence of life or a term of years is well known in this state. See MCL 750.317; *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989). A disproportionately light sentence is as objectionable as a disproportionately onerous one.

[3] See also *Alexander v Birkett*, 228 Fed Appx 534 (CA 6, 2007).

law's harshest term of imprisonment proportionately punishes a juvenile offender." *Miller*, 567 US at ___; 132 S Ct at 2466.

Postponing proportionality analysis until parole eligibility is simply inconsistent with *Miller*. This is particularly true in Michigan, as the statutory and administrative standards governing our parole board's decision-making bear no resemblance to the most relevant mitigating factors identified in *Miller*: a juvenile's diminished moral culpability, the "wealth of characteristics and circumstances attendant to" an offender's youth at the time the crime was committed, and the harshness of a life sentence imposed on, for example, a 14-year-old child. *Miller*, 567 US at ___; 132 S Ct at 2467. Instead, Michigan's parole system focuses on "the prisoner's mental and social attitude" *at the time parole is considered*. MCL 791.233(1)(a). Although the parole guidelines examine the severity of the crime, they omit regard for a youthful offender's unique characteristics. See *In re Parole of Elias*, 294 Mich App 507, 512-517; 811 NW2d 541 (2011). Uncertain, unpredictable, and unlikely parole does not substitute for factoring in on the "front end" a juvenile's lessened culpability. *Miller* does not contemplate that a parole board may substitute for a sentencing judge.

Because the alternative sentencing options set forth in *Carp* are materially indistinguishable and discretionary in name only, they do not satisfy *Miller*. In practice, they are but two sides of the same life-imprisonment coin. Confining a sentencing court's ability to commit a juvenile to life without parole or to life with but the barest possible prospect of parole defies *Miller*'s mandate that when passing sentence, judges must "take into account how children are different, and how those differences counsel against irrevocably sentencing them

to a lifetime in prison." *Miller*, 567 US at ___; 132 S Ct at 2469. Accordingly, implementing *Miller* entails more than mechanically applying adult sentencing practices to child offenders.

*Carp* declares that *Miller* "does not require Michigan or other states with similar mandatory sentencing schemes to abrogate or abandon a hierarchical methodology of sentencing for those convicted of first-degree murder or to necessitate a term of years sentence consistent with a lesser offense, such as second-degree murder." *Carp*, 298 Mich App at 527. I respectfully submit that this statement reflects a misunderstanding of *Miller*. *Miller* does not "abrogate or abandon" any state's sentencing methodology. It simply requires that every state adjust that methodology in a manner that recognizes that "youth matters," allowing judges to implement that recognition by tailoring a sentence to fit the offender as well as the offense. Because a parolable life sentence in Michigan actually amounts to the imposition of a life-without-parole sentence, *Carp* has simply written mitigation out of the equation. Regardless whether a "term of years" sentence would correspond with a conviction of second-degree murder, it must remain an option for a sentencing court.

### III. THE MICHIGAN CONSTITUTION

Const 1963, art 1, § 16 prohibits the infliction of cruel or unusual punishment. In *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992), our Supreme Court held that this provision should be interpreted more expansively than the United States Supreme Court interprets the Eighth Amendment. Three "compelling reasons" guided the *Bullock* Court's decision to construe the provisions differently. First, Michigan's Constitution bars "cruel *or* unusual" punishments, while

the federal constitution addresses "cruel *and* unusual" punishments. *Id*. This textual variance "does not appear to be accidental or inadvertent." *Id*. at 30. The *Bullock* Court restated *Lorentzen*'s observation that "this difference in phraseology . . . might well lead to different results with regard to allegedly disproportionate prison terms." *Id*. at 31. Quoting *Lorentzen*, 387 Mich at 172, the Court explained that " '[t]he prohibition of punishment that is unusual but not necessarily cruel carries an implication that unusually excessive imprisonment is included in that prohibition.' " *Bullock*, 440 Mich at 31.

Next, *Bullock* drew on "historical factors" suggesting that the framers of Michigan's Constitution understood the meaning of the clause differently than did the United States Supreme Court. In contrast with the United States Supreme Court, by 1963 the Michigan Supreme Court had determined that the cruel and unusual punishment ban "include[d] a prohibition on grossly disproportionate sentences." *Id*. at 32. "Longstanding Michigan precedent" guided the *Bullock* Court's conclusion that the Michigan Supreme Court has historically interpreted the operative words through the prism of proportionality. *Id*. at 33-34 (formatting altered).

After establishing the interpretive independence of the Michigan Supreme Court concerning our Constitution's "cruel or unusual punishment" provision, the Court struck down as unconstitutionally disproportionate a mandatory sentence of life without possibility of parole for conviction of knowing possession of 650 grams or more of cocaine. *Id*. at 40. Notably, the United States Supreme Court had rebuffed an Eighth Amendment challenge to precisely the same sentence less than one year earlier in *Harmelin v Michigan*, 501 US 957;

111 S Ct 2680; 115 L Ed 2d 836 (1991). The Michigan Supreme Court specifically embraced Justice Byron White's dissenting opinion in *Harmelin*, ruling that "[t]o be constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt." *Bullock*, 440 Mich at 39, quoting *Harmelin*, 501 US at 1023 (White, J., dissenting).

*Bullock* thereby invalidated the life-without-parole sentences for the two defendants in that case, as well as all others "currently incarcerated under the same penalty, and for committing the same offense[.]" *Bullock*, 440 Mich at 42. The "most appropriate remedy" for the disproportionate life sentences imposed on those offenders, the Court concluded, was to "ameliorate the no-parole feature of the penalty" and to require that "such defendants [receive] the parole consideration otherwise available upon completion of ten calendar years of the sentence" in accordance with MCL 791.234(4), which is now MCL 791.234(7)(a). *Bullock*, 440 Mich at 42.

In *Bullock*, 440 Mich at 34, the Court acknowledged that its proportionality analysis derived from *Lorentzen*. The 23-year-old defendant in *Lorentzen* was convicted of "the unlicensed sale, dispensation or otherwise giving away of any quantity of marijuana," and was sentenced to the mandatory minimum for that offense: 20 years' imprisonment. *Lorentzen*, 387 Mich at 170-171. The defendant lived with his parents, worked at General Motors, and had no other criminal convictions. *Id*. at 170. The Supreme Court held the defendant's sentence unconstitutional under the Michigan Constitution, explaining that "[a] compulsory prison sentence of 20 years for a nonviolent crime imposed without consideration for defendant's individual personality and history is so excessive that it 'shocks the conscience.' " *Id*. at 181.

*Lorentzen* fashioned a three-factor test for evaluating proportionality under the Michigan Constitution. First, a court must weigh the gravity of the offense against the severity of the punishment. *Id*. at 176. Next, a court applies the "decency test," which compares the sentences for other similar and different crimes, in Michigan and in other states. *Id*. at 179. Finally, a court looks to "rehabilitative considerations in criminal punishment," recognizing that Michigan's sentencing scheme is designed " 'to reform criminals and to convert bad citizens into good citizens, and thus protect society[.]' " *Id*. at 179-180, quoting *People v Cook*, 147 Mich 127, 132; 110 NW 514 (1907). Specifically,

> "[t]his test looks to a consideration of the modern policy factors underlying criminal penalties—rehabilitation of the individual offender, society's need to deter similar proscribed behavior in others, and the need to prevent the individual offender from causing further injury to society." [*Lorentzen*, 387 Mich at 180, quoting *In re Southard*, 298 Mich 75, 82; 298 NW 457 (1941).]

This final criterion, the *Bullock* Court explained, is "rooted in Michigan's legal traditions[.]" *Bullock*, 440 Mich at 34.

*Bullock* and *Lorentzen* stand for the proposition that Const 1963, art 1, § 16 prohibits both an unusually excessive period of imprisonment when compared with the seriousness of the crime, and a punishment that qualifies as disproportionately cruel considering the characteristics of the offender. In my view, sentencing a juvenile to life imprisonment with or without parole effectively trumps *Lorentzen*'s "decency test" and casts aside the mainstay rehabilitative ideals encompassed within article 1, § 16.[4]

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[4] The majority implies a preference that the current Supreme Court overrule *Bullock* and *Lorentzen*. I find this preference quite ironic in light

IV. MICHIGAN'S CONSTITUTION AND JUVENILE HOMICIDE OFFENDERS

The Michigan Supreme Court explicitly recognized in *Lorentzen* and *Bullock* that "moral guilt" and "the moral sense of the people" inform proportionality. *Bullock*, 440 Mich at 39, 35 n 18 (quotation marks and citations omitted). This acknowledgment corresponds with the United States Supreme Court's portrayal of the evolving nature of Eighth Amendment jurisprudence: "The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." *Furman v Georgia*, 408 US 238, 382; 92 S Ct 2726; 33 L Ed 2d 346 (1972) (Burger, C.J., dissenting). *Roper*, *Graham*, and *Miller* underscore that the need to sentence children differently than adults has achieved acceptance as a moral imperative.

In *Lorentzen* and *Bullock*, as in *Graham* and *Miller*, the Courts exercised "independent judgment requir[ing] consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." *Graham*, 560 US at ___; 130 S Ct at 2026. In these cases, the United States Supreme Court struck down sentences deemed excessive in light of contemporary norms and discordant with the penological goals sentencing should fulfill. All four cases agreed that as a matter of constitutional law, mandatory punishments insufficiently corresponding with a defendant's indi-

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of the majority's paean to precedent from *Allegheny Gen Hosp v NLRB*, 608 F2d 965, 969-970 (CA 3, 1979). I remind the majority that despite the Legislature's power to fashion sentences for crimes, the people of this state limited that authority by ratifying article 1, § 16 of Michigan's Constitution. To hold otherwise denigrates our Constitution and disregards the judiciary's role in constitutional enforcement.

vidual blameworthiness and the legitimate purposes of punishment do not pass muster. In this regard, as *Bullock* explicitly recognized, Michigan's proportionality jurisprudence foreshadowed the development of federal Eighth Amendment law. While the United States Supreme Court in *Miller* declined to categorically ban lifetime imprisonment for juveniles who have committed murder, I believe that pursuant to *Bullock* and *Lorentzen*, Const 1963, art 1, § 16 commands this result in Michigan.

Mandatory life imprisonment constitutes the single harshest sentence that can be imposed by a Michigan judge. Lifetime incarceration of a juvenile, imposed without regard to his or her individual background and emotional development, is morally insupportable for the host of reasons discussed in *Roper*, *Graham*, and *Miller*. "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Roper*, 543 US at 570. To protect the community, it may be rational to deprive an adult murderer of any hope of freedom. The morality of such a severe sentence rests on the need to incapacitate a dangerous person, to exact retribution, and to deter others from committing the same heinous crime. Those ethical considerations ring hollow when applied to a youth such as Dakotah.

Dakotah is not a hardened criminal; when he killed his grandfather, he was an extremely troubled young man. As quoted in Dakota's supplemental brief supporting his motion for a new trial the forensic report addressing his criminal responsibility elucidated that Dakotah

> experienced a significant amount of loss in a relatively short period of time, namely the deaths of his cousin, dog

> and friend to suicide, not to mention the back drop of the very significant and repeated loss of his mother via abandonment. These losses would be difficult for any adolescent to cope with, but Mr. Eliason seems to have lacked the supports and guidance many others receive from their parents/family and even friends. As a result he appears to have been left to his own devices and he appears to have lacked the capabilities to gradually come to terms with these losses. Rather, they were forces which overwhelmed him.

Additionally, defense counsel elicited testimony from the forensic examiner at the posttrial evidentiary hearing that the trauma Dakotah experienced triggered him to view the world "like he was watching a movie" so that "everything appear[ed] to be fantasy," thereby explaining Dakotah's actions.

Given Dakotah's emotional limitations at age 14, officially pronouncing that he is and forever will be irretrievably depraved flies in the face of common sense. Dakotah's maturational shortcomings mirror those of the youthful offenders described in *Roper*, *Graham*, and *Miller*. These defendants lacked the ability to regulate negative and destructive behavior—a defining feature of adolescence. It is simply impossible to predict whether Dakotah will someday develop the ability to grasp the full horror of his crime and to employ that knowledge in his emotional growth. "Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation." *Graham*, 560 US at ___; 130 S Ct at 2032. Because youthful offenders may grow and change, "irrevocable judgment[s] about" their characters offend our Constitution's proportionality guarantee. *Id*. at ___; 130 S Ct at 2030.

Furthermore, mandatory lifetime incarceration of a teenager serves no valid penological purpose. "A sentence lacking any legitimate penological justification is

by its nature disproportionate to the offense." *Id*. at ___; 130 S Ct at 2028. In *Lorentzen*, our Supreme Court described three primary "policy factors underlying criminal penalties": rehabilitation, deterrence, and prevention. *Lorentzen*, 387 Mich at 180.[5] A mandatory lifetime sentence "does not even purport to serve a rehabilitative function." *Harmelin*, 501 US at 1028 (Stevens, J., dissenting). As *Graham* explained, juvenile offenders are generally not susceptible to being deterred based on their propensity for making "impetuous and ill-considered" decisions. *Graham*, 560 US at ___; 130 S Ct at 2028-2029 (quotation marks and citation omitted). And while permanently incarcerating a juvenile likely eliminates the possibility that he or she will commit another homicide, this is an extraordinarily drastic measure given the very real possibility that age would accomplish the same result. "*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 567 US at ___; 132 S Ct at 2465.

*Lorentzen* and *Bullock* support that mandatory lifetime prison sentences may not be imposed on homicide offenders under age 18. By forbidding cruel punishment regardless of its commonality, Michigan's Constitution prohibits imposing a severe, mandatory sentence that ignores both an offender's circumstances and lacks applicability to the goals of punishment recognized in this state. The evolving standards of decency elegantly articulated in *Graham* and *Miller* represent "the moral sense of the people" that imprisoning children for life is

[5] Retribution constitutes a fourth. The arguments supporting purely retributive justice lose their power when applied to offenders who lack the ability to regulate their behavior. See *Roper*, 543 US at 571.

a disproportionate penalty regardless of the crime. Furthermore, lifetime imprisonment of a child serves no rational purpose. Accordingly, I would hold that lifetime imprisonment of a juvenile offender violates Const 1963, art 1, § 16.

### V. RESENTENCING DAKOTAH

When the trial court sentenced Dakotah to life imprisonment without possibility of parole, it rejected his counsel's argument that this sentence constituted a cruel or unusual punishment. "Other than his juvenile status," the trial court opined, "there's really nothing about Mr. Eliason that makes him less culpable than any other person who has murdered another human being in cold blood." The trial court spoke these words before the Supreme Court issued its decision in *Miller*. Accordingly, the majority correctly recognizes that Dakotah must be resentenced.

Despite that the trial court lacked the benefit of *Miller*'s reasoning when it imposed sentence, I believe that the trial court has clearly and unequivocally expressed its opposition to any sentence less than mandatory life. I quote the court's sentencing rationale at length here because I believe it demonstrates that the trial court has made up its mind about Dakotah, regardless of *Miller*:

> In this case the defendant was examined by two mental health profession[al]s, including one selected by the defense. There's been no showing that the defendant suffered from any mental health or intellectual deficiency. To the contrary, all the evidence has been that Mr. Eliason is an intelligent and articulate young man. There was some testimony that Mr. Eliason was going through some personal problems. But other than the recent suicide of a close friend, which the court concedes is a major event in the life of any young person, any

one, but otherwise he was attempting to work through problems common to many 14 year old boys.

His parents separated when he was young. He didn't get to spend enough time with his mother or his half-brother. He had some difficulty in meeting his father's expectations. His pet died. These are problems that certainly are -- I'm not saying they're insubstanial, but they're certainly common to many 14 year old boys.

* * *

There are factors which in the court's view might make, and do make the defendant more culpable than perhaps other defendants who have committed first degree murder. He enjoyed a close relationship with his victim, and enjoyed -- and had the benefit of his grandfather's frequent hospitality. Mr. Eliason was welcomed almost every weekend into the victim's home and treated [it] as a weekend refuge from his own -- life with his own family.

There has been no mitigating explanation provided for the murder. And the reason for the killing apparently remains a mystery to this day.

Mr. Eliason's testimony showed he spent several hours quietly contemplating whether or not to kill his grandfather. And then after that period of contemplation was over, shot his grandfather in the head while his grandfather slept. When the murder weapon was found the hammer on the revolver was cocked, and there were five live rounds in the chamber.

And the court, along with the jury, listened carefully to the recorded statements given by Mr. Eliason at the scene, later at the law enforcement complex, and remarks that he made to Deputy Casto while he was seated in the back of Deputy Casto's patrol car. Mr. Eliason showed a remarkable lack of emotion or remorse after the shooting and talked about the situation in a very calm and matter of fact way.[6]

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[6] Lack of demonstrated remorse is yet another feature of a child's immaturity. For a full discussion of this subject, see Duncan, *"So young*

> There – the court has been presented with nothing to convince [sic] that a life without parole sentence is particularly cruel and unusual when imposed upon Mr. Eliason in particular. *And as I said, certain aspects of the case show that such a sentence is particularly appropriate when applied to Mr. Eliason*. So the court does not find that a life without parole sentence for Mr. Eliason, convicted of first degree murder is in violation of the constitution as cruel and unusual. [Emphasis added.]

It is unreasonable to expect that the trial court will simply discard these sincerely held views in light of *Miller*. The trial court's words make abundantly clear its rejection that the mitigating factors of youth described in *Miller*, *Graham*, and *Roper* should be applied to Dakotah. To preserve the appearance of fairness and justice, a different judge should resentence Dakotah. See *People v Evans*, 156 Mich App 68, 71-72; 401 NW2d 312 (1986).

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*and so untender": Remorseless children and the expectations of the law*, 102 Colum L Rev 1469 (2002). Judge Richard Posner has also written, quite persuasively, that an apparent absence of remorse ("a mitigating factor") does not automatically translate for sentencing purposes to the presence of an aggravating factor. *United States v Mikos*, 539 F3d 706, 721-724 (CA 7, 2008) (Posner, J., dissenting).

*In re* BEATRICE ROTTENBERG LIVING TRUST

Docket No. 297984. Submitted March 12, 3013, at Detroit. Decided April 4, 2013, at 9:10 a.m.

Siblings Joan R. Lipsitz, Mark F. Rottenberg, and Lisa Friedman were the children of Everett Newton and Beatrice Rottenberg. Joan and her husband were officers and shareholders of five different corporations to which Everett made several loans totaling significantly more than $2 million. Some of the loans were never repaid, and the corporations were eventually liquidated and dissolved in bankruptcy. When Everett died, some of his tangible personal property was devised to Beatrice and the residue poured over into the Everett Newton Rottenberg Living Trust (ENR Trust), with Beatrice, Mark, and Joan serving as cotrustees and Beatrice being the lifetime income beneficiary of two marital subtrusts. Upon Beatrice's death, her estate poured over into the Beatrice Rottenberg Living Trust (BR Trust), with Mark and Joan as cotrustees. Lauren Underwood was subsequently appointed as the successor personal representative of Everett's estate and the sole successor trustee of the ENR Trust. Mark filed the petition in this case in the Oakland County Probate Court to remove Joan as a cotrustee of the BR Trust and surcharge her for alleged violations of her fiduciary duties. She in turn petitioned to have Mark removed as a cotrustee and surcharged. The court, Eugene Arthur Moore, J., removed Mark and Joan as cotrustees of the BR Trust and appointed John Yun as sole successor trustee. In a series of petitions and amended petitions by Mark and Joan alleging numerous violations of fiduciary duties, Mark sought an accounting by Joan of all the loans that Everett had made to the corporations and repayment to the BR Trust of the unpaid loans and Joan asserted that Everett had upon his death given her the right to seek repayment of the unpaid loans. Mark eventually sought a default judgment, and Joan moved for partial summary disposition, seeking a determination that she was not personally liable for repaying the outstanding loans. Mark also moved for partial summary judgment, arguing that Everett had not given Joan the right to seek repayment. The court denied Mark's

request for a default judgment and sanctions but granted Mark partial summary disposition, concluding that there was no gift. Joan filed a claim of appeal.

The Court of Appeals *held*:

1. The probate court's order was not a final order under MCR 5.801(B)(2) because it did not affect with finality the rights of the parties in this matter. The order left open several questions, including who was responsible for repaying the loans and what they were worth. Accordingly, the order was not appealable by right. Nevertheless, in the exercise of its discretion, the Court of Appeals treated Joan's claim of appeal as an application for leave to appeal and granted it.

2. Under MCL 700.1105(c), 700.7103(*l*)(*i*), and 700.7203(1), Mark had statutory standing in this case to invoke the probate court's jurisdiction with respect to the administration of the BR Trust. In general, however, MCR 2.201(B) requires that an action be prosecuted in the name of the real party in interest, that is, by the party who under the substantive law in question owns the claim asserted. Although the principle of statutory standing overlaps significantly with the real-party-in-interest rule, they are distinct concepts. The principle of statutory standing is jurisdictional: if a party lacks statutory standing, then the court generally lacks jurisdiction to entertain the proceeding or reach the merits. In contrast, the real-party-in-interest rule is a prudential limitation on a litigant's ability to raise the legal rights of another. A real party in interest is one who is vested with the right of action on a given claim even if another has the beneficial interest. Mark was not the proper party to pursue the instant claims concerning the ownership of the right to demand repayment of the loans. That right belonged exclusively to Underwood, the trustee of the ENR Trust. The essence of Mark's argument was that Everett had not given Joan the right to demand repayment of the loans and that the value of the outstanding loans should therefore be used to offset any distributive share to which Joan would otherwise be entitled. It is the duty of the trustee to administer the trust for the benefit of the beneficiaries, MCL 700.7801, to control and protect the property of the trust, MCL 700.7810, to enforce any claims of the trust, MCL 700.7812, and to marshal and collect outstanding trust property, MCL 700.7813(1). Because Mark was not the real party in interest, his claims should have been dismissed.

3. Any issues concerning the status or ownership of the loans and whether Everett gave the right to demand repayment of the

loans to Joan should have been litigated exclusively in the ENR Trust proceedings rather than this proceeding. Everett alone made the loans at issue and therefore held the exclusive right to demand repayment of the loans during his lifetime. The right to demand repayment of a loan or debt is a chose in action and therefore an item of intangible personal property. Under MCL 600.2921, the right survives death. Accordingly, under the terms of Everett's will, the right to demand repayment of the loans became an asset of the ENR Trust immediately upon Everett's death.

Order vacated and case remanded for further proceedings.

1. APPEAL — ORDERS — FINAL ORDERS — PROBATE COURT.

Final orders of a probate court that affect the rights of an interested person in a proceeding involving a decedent's estate or a trust are appealable by right to the Court of Appeals; the determination of which orders are final and which are not must be made on a case-by-case basis; the test of finality of a probate court order is whether it affects with finality the rights of the parties in the matter; if a party files a claim of appeal related to an order that is not a final order, the Court of Appeals has discretion to treat the claim of appeal as an application for leave to appeal and grant it (MCR 5.801[B][2], 7.205[D][2]).

2. ACTIONS — PROBATE COURT PROCEEDINGS — REAL PARTY IN INTEREST.

An action must be prosecuted in the name of the real party in interest, that is, one who is vested with the right of action on a given claim even if another has the beneficial interest; the rule requires that the claim be prosecuted by the party who under the substantive law in question owns the claim asserted; a proceeding in the probate court is an action for purposes of this rule (MCR 2.201[B], 5.101[A]).

*William Dobreff* for Mark F. Rottenberg.

*Prince Law Firm* (by *Shaheen I. Imami*) for Joan R. Lipsitz.

*LoPrete & Lyneis, P.C.* (by *Mary M. Lyneis*), for John Yun.

*Bingham Legal Group, PC* (by *Kristin A. Hughes*), for Lauren M. Underwood.

Before: JANSEN, P.J., and FITZGERALD and K. F. KELLY, JJ.

JANSEN, P.J. Respondent, Joan R. Lipsitz (Joan), appeals by right the probate court's order of April 29, 2010, granting partial summary disposition in favor of petitioner, Mark F. Rottenberg (Mark), on the ground that it was beyond genuine factual dispute that Dr. Everett Newton Rottenberg (Dr. Rottenberg) had not gifted to Joan the right to demand repayment of certain loans that he had made during his lifetime.[1] For the reasons set forth in this opinion, we vacate the probate court's order and remand for further proceedings.

## I. BASIC FACTS

Joan, Mark, and Lisa Friedman (Lisa)[2] are siblings. They are the only children of the late Dr. Rottenberg and the late Beatrice Rottenberg (Mrs. Rottenberg).

Joan and her husband, Robert Lipsitz, were officers and stockholders of five different corporations (collectively, "the ranch entities").[3] Together, the five ranch entities made up the Double JJ Ranch and Golf Resort in Oceana County, Michigan.

Dr. Rottenberg made several loans to the ranch entities by personal check during the 1990s and the

[1] Joan filed her claim of appeal with this Court on May 11, 2010. Mark argues in his brief on appeal that the probate court's order of April 29, 2010, was not a final order appealable by right under MCR 5.801(B)(2) and that this Court accordingly lacks jurisdiction to consider this appeal. This issue is addressed in part III of this opinion.

[2] Lisa is not a party on appeal.

[3] These five corporations were (1) Outdoor Resources, Inc., (2) Carpenter Lake Development, Inc., (3) Carpenter Ridge, Inc., (4) Double JJ Resort Ranch, Inc., and (5) American Appaloosas, Inc. Each of the ranch entities filed for bankruptcy on July 18, 2008, and all five corporations had been liquidated and dissolved as of 2010.

early 2000s, apparently totaling significantly more than $2 million. Some of these loans were repaid during Dr. Rottenberg's lifetime. Other loans were never repaid to Dr. Rottenberg.

Each of the checks written by Dr. Rottenberg was made payable to one of the ranch entities. None of the checks was made payable to Joan or her husband. A few of these checks contained the word "loan" on the memo line. However, the memo line was left blank on the majority of the checks. None of the later checks appears to have been accompanied by a promissory note or any other separate evidence of indebtedness. Neither Joan nor her husband executed personal guarantees promising to repay any of the loans from Dr. Rottenberg.

Dr. Rottenberg died testate on April 23, 2005.[4] Under the terms of Dr. Rottenberg's will, certain items of tangible, household personalty were devised to Mrs. Rottenberg. However, the residue of Dr. Rottenberg's estate poured over into the Everett Newton Rottenberg Living Trust (ENR Trust). The trust instrument specified that, upon the death of Dr. Rottenberg, the cotrustees of the ENR Trust would be Mrs. Rottenberg, Mark, and Joan. Upon the death, resignation, or incapacity of Mrs. Rottenberg, Mark and Joan were to remain as cotrustees of the ENR Trust.[5]

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[4] On August 11, 2005, Mrs. Rottenberg opened her late husband's estate by filing an application for informal probate in the Oakland Probate Court. See *In re Rottenberg Estate* (Oakland Probate Case No. 2005-299590-DA). Initially, Mrs. Rottenberg served as personal representative of Dr. Rottenberg's estate. In May 2007, John Yun was appointed to serve as successor personal representative of Dr. Rottenberg's estate. It appears that Yun was replaced by Lauren Underwood as successor personal representative of Dr. Rottenberg's estate in February 2009.

[5] The probate court removed Mark and Joan as cotrustees of the ENR Trust in February 2009 and appointed Lauren Underwood as sole, successor trustee of the ENR Trust.

Under the terms of the ENR Trust instrument, two distinct subtrusts were established upon the death of Dr. Rottenberg: (1) a Marital Trust and (2) a Residuary Trust.[6] The Marital Trust was further divided into (1) a Marital Trust for Spouse and (2) a Terminable Interest Marital Trust for Spouse. Suffice it to say that Mrs. Rottenberg was, for all practical purposes, a lifetime income beneficiary of the two marital subtrusts.[7]

Mrs. Rottenberg died testate on April 16, 2008. Under the terms of Mrs. Rottenberg's will, most or all of her estate poured over into her own trust, the Beatrice Rottenberg Living Trust (BR Trust). The trust instrument specified that Mark and Joan were to serve as cotrustees of the BR Trust upon Mrs. Rottenberg's death.

On July 18, 2008, each of the five ranch entities filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the Western District of Michigan.

## II. PROCEDURAL HISTORY

The instant proceedings began on April 14, 2006, when Mark filed a petition in the Oakland County

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[6] The ENR Trust instrument also created a Generation Skipping Trust. The Generation Skipping Trust is not at issue in this appeal.

[7] We acknowledge that Mrs. Rottenberg was entitled to as much principal of the Marital Trust for Spouse as she *requested* during her lifetime, and as much principal of the Terminable Interest Marital Trust for Spouse as she *needed* during her lifetime. Mrs. Rottenberg was further entitled to as much income and principal of the Residuary Trust as she *needed* during her lifetime. However, the probate court record contains no evidence to establish that Mrs. Rottenberg ever requested or needed any of these additional amounts. We further acknowledge that certain provisions of the ENR Trust instrument gave Mrs. Rottenberg the power to appoint the principal and accumulated income of various subtrusts by way of her will or an *inter vivos* document. However, there is no evidence in the probate court record to indicate that Mrs. Rottenberg exercised any of these powers of appointment.

Probate Court to remove Joan as a cotrustee of the BR Trust and surcharge her for various alleged violations of her fiduciary duties. On May 2, 2006, Joan responded by filing a petition to remove Mark as a cotrustee of the BR Trust and surcharge him.

On October 12, 2007, Mark filed a subsequent petition to compel an accounting by Joan, including a full disclosure of all loans made by Dr. and Mrs. Rottenberg to the ranch entities. Mark claimed that, in addition to $400,000 in loans from Mrs. Rottenberg, Dr. Rottenberg had loaned more than $2 million to the ranch entities during his lifetime and many of these loans remained unpaid. Mark alleged that Joan had destroyed or concealed certain evidence, including evidence of the loans, and that she had also removed documents and money from Dr. Rottenberg's residence upon his death without accounting for it.

Joan asserted that many of the loans made by Dr. Rottenberg, especially his earlier loans, had already been repaid. Consistent with Joan's assertion, the probate court record contains evidence establishing that the ranch entities repaid at least $1,809,248.22 to Dr. Rottenberg between 2002 and 2004. These repayments were apparently for principal and interest on various earlier loans made by Dr. Rottenberg, including some that were evidenced by a promissory note dated February 22, 2003. Joan asserted that, upon his death, Dr. Rottenberg had gifted to her the right to seek repayment of the remaining loans that he had made to the ranch entities.

Mark then filed an amended petition. Among other things, Mark asserted that Joan and her husband had been commingling corporate funds among the five ranch entities. Mark alleged that Dr. Rottenberg had loaned more than $1.7 million to the ranch entities

between January 2, 1992, and March 23, 2000. He alleged that Dr. Rottenberg had loaned an additional $1.19 million to the ranch entities between January 23, 2002, and November 26, 2004, but that Joan had "concealed" the existence of these loans. Mark pointed to Joan's deposition of July 11, 2007, at which Joan acknowledged that Dr. Rottenberg had expected to be repaid.[8] Mark argued that Joan and her husband were "falsely claiming there were only $400,000 in outstanding loans," and suggested that the loans from Dr. Rottenberg to the ranch entities were repayable to either Mrs. Rottenberg or the BR Trust.

Joan also filed an amended petition. Among other things, Joan alleged that Mark had wasted or misused BR Trust proceeds without providing an accounting.

On or about May 28, 2008, the probate court removed both Mark and Joan as cotrustees of the BR Trust and appointed John Yun as sole, successor trustee of the BR Trust.

In an affidavit dated August 31, 2009, Joan admitted that her father had loaned substantial amounts to the ranch entities during his lifetime. However, Joan averred that by the time of Mrs. Rottenberg's death, the total amount remaining due on these loans was much less than the face value of the loans.

On August 12, 2009, Mark filed a petition for a default judgment and sanctions, claiming that Joan had concealed or destroyed evidence of many of the loans from Dr. Rottenberg, that Joan had given false testimony regarding these loans at her depositions, and that Joan was withholding significant sums that were payable to the BR Trust. Mark alleged that Joan had violated her duty of

[8] However, Joan also testified that her father had never specified a particular date by which the loans were to be repaid.

loyalty in several ways during her tenure as a cotrustee and asserted that she had never properly provided an accounting. Mark asserted that there was at least $1.85 million, plus significant interest, due and owing to the BR Trust in the form of outstanding, unpaid loans from Dr. Rottenberg to the ranch entities.

Joan objected to Mark's petition. She asserted that she had not engaged in misconduct and contended that Mark and his attorney had misrepresented the facts of the case and attempted to mislead the probate court.

Mark replied, asserting that the ranch entities owed at least $1.8 million in principal and $1,301,286 in interest on the various loans from Dr. Rottenberg. Mark alleged that Joan and her husband had "stolen" these loans and manipulated the books of the ranch entities to hide them. Specifically, Mark contended that Joan had altered the corporate books to show that the loans from Dr. Rottenberg were repayable to the Lipsitzes themselves. According to Mark, these loans were actually repayable to the BR Trust.

Joan admitted that the corporate books had been altered to show that the loans from Dr. Rottenberg were repayable to her and her husband. But she contended that this was done in accordance with the express wishes of Dr. Rottenberg, who had gifted to her the right to demand repayment of the outstanding loans upon his death.

On October 7, 2009, Mark filed a second petition for a default judgment, alleging that Joan had lied during her earlier depositions. In addition to repeating his previous allegations, Mark claimed that Joan had failed to disclose certain other information in her possession concerning the loans from Dr. Rottenberg. Mark again argued that Joan and her husband had fraudulently manipulated the financial records of the ranch entities

by reclassifying the loans from Dr. Rottenberg as loans that were repayable to the Lipsitzes.

In response, Joan asserted that Dr. Rottenberg "never expected to be repaid for any of the outstanding loans" and that Dr. Rottenberg had intended "that such loans were to become Joan's at [his] death." Joan also argued that Mark lacked standing to pursue any claims concerning the ownership of the outstanding loans because those claims belonged exclusively to the fiduciaries of Dr. Rottenberg's estate or the ENR Trust.

On September 1, 2009, Joan filed a motion for partial summary disposition, seeking a determination that it was beyond factual dispute that she was not personally liable for repaying the outstanding loans made by Dr. Rottenberg to the ranch entities. See MCR 2.116(C)(10). Among other things, Joan sought a judicial determination that the monies loaned to the ranch entities were "debts of the Ranch Entities and not of Joan Lipsitz." Joan admitted that she had purchased Mrs. Rottenberg's stock in the ranch entities in 2005 and had also agreed to assume personal liability for the $400,000 that her mother had loaned to the corporate entities. Joan contended that, beyond these notes for $400,000, she had never agreed to assume any of the other debts owed by the ranch entities to Dr. Rottenberg, the ENR Trust, or the BR Trust.

Mark responded on October 13, 2009. He claimed that because he had alleged in an earlier petition that Joan was personally liable for the loans from Dr. Rottenberg and Joan had failed to specifically respond to these allegations, the allegations were deemed admitted pursuant to MCR 2.111(E)(1).[9] Mark argued that be-

[9] MCR 2.111(E)(1) provides that "[a]llegations in a pleading that requires a responsive pleading, other than allegations of the amount of damage or the nature of the relief demanded, are admitted if not denied

cause this was a proceeding to surcharge Joan, as a former cotrustee of the BR Trust, and because he was a beneficiary of the BR Trust, he had standing to bring the instant petitions and seek repayment of the loans. Mark cited several instances, including e-mails, statements in court, and deposition testimony, wherein Joan had suggested that she would be willing to repay the loan obligations of the ranch entities out of her distributive share under the BR Trust.

Mark then filed an amended petition for default judgment and sanctions. Mark again argued that Joan and her husband had concealed and destroyed certain evidence of the loans from Dr. Rottenberg. Joan responded, asserting that as of the date of Dr. Rottenberg's death, the outstanding value of the loans from Dr. Rottenberg to the ranch entities was $1.85 million, and the outstanding value of the loans from Mrs. Rottenberg to the ranch entities was $400,000. Joan once again pointed out that she had agreed to assume liability for the $400,000 loaned by Mrs. Rottenberg.

On March 2, 2010, Mark filed a motion for partial summary disposition, arguing that it was beyond factual dispute that the right to demand repayment of the loans from Dr. Rottenberg to the ranch entities had not been gifted to Joan. See MCR 2.116(C)(10). Mark took issue with Joan's recent deposition testimony, in which Joan had testified that her father gave her the right to seek repayment of the loans as a gift upon his death. Mark pointed to several of Joan's previous depositions during which she had admitted that her father expected repayment.

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in the responsive pleading." A petition filed in the probate court constitutes a "pleading" under the Michigan Court Rules. MCR 5.001(B)(2).

Joan reiterated her position that Dr. Rottenberg had given her the right to seek repayment of any loans to the ranch entities that remained outstanding at his death. Joan argued that there was no genuine issue of material fact and that all outstanding loans from Dr. Rottenberg to the ranch entities had been given to her as a personal gift.

Lauren Underwood, successor trustee of the ENR Trust and personal representative of Dr. Rottenberg's estate, responded to the motions for partial summary disposition on April 1, 2010. Underwood clarified that the $400,000 in loans from Mrs. Rottenberg had been purchased by Joan and subsequently repaid to the BR Trust. Underwood also clarified that, although it was true that Dr. Rottenberg had loaned substantial amounts to the ranch entities during his lifetime, "it has always been Joan's position that her father did not intend for those amounts to be repaid, but instead, intended for her to receive the loans as gifts after his death." Underwood took exception to Mark's assertion that the loans were repayable to the BR Trust. Underwood noted that the loans in question had been made by Dr. Rottenberg and that they would therefore be repayable to the ENR Trust, not the BR Trust.

Underwood asserted that, even if the probate court did have jurisdiction in the BR Trust proceedings to consider whether the loans had been gifted to Joan, there remained significant questions of fact that would preclude summary disposition. For example, Underwood noted that several of Mark's own filings were inconsistent with regard to the total amount of indebtedness, valuing the outstanding loans from Dr. Rottenberg to the ranch entities at $2 million, $2.25 million, $1.85 million, and $2.31 million respectively. Underwood requested that the probate court deny Mark's

motion for partial summary disposition and enter an order declaring that any claims concerning the ownership of the outstanding loans from Dr. Rottenberg properly belonged to her as the fiduciary of the ENR Trust and Dr. Rottenberg's estate.

John Yun, successor trustee of the BR Trust, concurred with Underwood's assertion that any claims concerning the outstanding loans from Dr. Rottenberg to the ranch entities should not be litigated in the BR Trust case.

The probate court entered an order denying Mark's request for a default judgment and for sanctions without prejudice. The court then held a hearing on the motions for partial summary disposition on April 29, 2010. Mark's attorney argued that "at the time of Everett Rottenberg's death, there were at least $2.25 million in loans owed to the Rottenbergs by the ranch entities," and that "the . . . loans were not gifted to Joan Lipsitz prior to Everett Rottenberg's death." Counsel cited at least two occasions on which Joan had admitted under oath that the loans were repayable to her father. Joan's attorney remarked that the only issue to be decided by the probate court was whether Dr. Rottenberg had intended to give Joan the right to demand repayment of the loans that remained outstanding at his death. Joan's attorney suggested that such a gift could have been a present gift or a gift *causa mortis*. He argued that, at the very least, there were genuine issues of material fact that should be decided by a jury.[10]

Kevin Check, who had previously served as guardian ad litem for Mrs. Rottenberg,[11] noted that "Joan's

[10] It is undisputed that a jury had been demanded and that, at the time of the probate court's hearing on the motions for partial summary disposition, the court had already scheduled a jury trial on this issue.

[11] Check remained involved in these proceedings, at least to a minimal extent, even after Mrs. Rottenberg's death. Check is not a party on appeal.

testimony has, in fact, been . . . all over the board." But Check confirmed that Joan had "clearly [and] unequivocally" testified, during at least one of her depositions, "that it was her understanding, based on the conversations and dealings that she had with her father and her mother, that it was . . . E. N. Rottenberg's intent that when he passed away, that [the ranch] entities would not have to repay his estate." The probate court questioned aloud whether Joan's subjective beliefs concerning what her father had intended at the time of his death would be admissible in evidence.

Underwood argued that, assuming the right to seek repayment of the loans was not given to Joan as a gift, the loans were clearly repayable to the ENR Trust or to Dr. Rottenberg's estate, not to the BR Trust. Consequently, Underwood asserted, any claims concerning the loans should be litigated in the ENR Trust proceedings. Indeed, Underwood noted that she was pursuing these very issues in separate actions that she had filed on behalf of the ENR Trust and Dr. Rottenberg's estate. Yun again concurred with Underwood's arguments.

After having heard the arguments of the parties and their counsel, the probate court observed in pertinent part:

> . . . I think what we got here is somebody was deposed, and being deposed, [Joan] tried to answer the questions very honestly. And to date, from what I heard and I read all the briefs, and all the arguments in Court, I see no disputed facts. And the Court will grant the . . . partial summary [disposition] motion. And . . . the Court rules that it's . . . not a gift. But that doesn't say . . . who owes the loan, how much the loan is, or whether any of the loan has been repaid.

On April 29, 2010, the probate court entered an order granting Mark's motion for partial summary disposi-

tion in part. The order stated merely that "Mark Rottenberg's motion for partial summary disposition regarding loans by [the Rottenbergs] to [the] Ranch Entities . . . is granted in part" and "[t]he court finds they are loans and not gifts."

## III. JURISDICTIONAL CHALLENGE

Mark argues in his brief on appeal that the probate court's order of April 29, 2010, was not a final order appealable by right under MCR 5.801(B)(2), and that this Court therefore lacks jurisdiction to consider this appeal.

With respect to probate cases, this Court has jurisdiction of an appeal of right from "[a] judgment or order . . . from which appeal of right to the Court of Appeals has been established by law or court rule." MCR 7.203(A)(2). In a proceeding involving a decedent's estate or trust, "[o]rders appealable of right to the Court of Appeals are defined as and limited to . . . final order[s] affecting the rights or interests of an interested person . . . ." MCR 5.801(B)(2); see also MCL 600.861(a) and MCL 700.1305. Those "final order[s]" of the probate court that are appealable by right to this Court are further "defined . . . and limited" by MCR 5.801(B)(2)(a) through (ee).

Joan asserts that the probate court's order of April 29, 2010, was appealable by right to this Court pursuant to MCR 5.801(B)(2)(o), because it was a final order of the probate court "determining title to or rights or interests in property[.]" "[T]he determination of which probate court orders are 'final' and which are not, for purposes of determining the appellate jurisdiction of this Court, has to be made on a case-by-case basis." *In re Miller Estate*, 106 Mich App 222, 224; 307 NW2d 450

(1981). "The test of finality of a probate court order is whether it affects with finality the rights of the parties in the subject matter." *Id*.

The probate court's order of April 29, 2010, was in no sense a "final order" within the meaning of MCR 5.801(B)(2). The order merely granted Mark's motion for partial summary disposition in part. The order did not "affect[] with finality the rights of the parties in the subject matter," *Miller Estate*, 106 Mich App at 224, because it left for another day the questions of who was responsible for repaying the loans, what the loans were worth, whether any of the loans had been repaid, and whether any of the loans had been forgiven. Accordingly, it was not appealable by right in this Court. MCR 5.801(B)(2); see also *Miller Estate*, 106 Mich App at 224-225. Nevertheless, in the exercise of our discretion, we have decided to treat Joan's claim of appeal as an application for leave to appeal and grant the application. See MCR 7.205(D)(2); *In re Investigative Subpoena*, 258 Mich App 507, 508 n 2; 671 NW2d 570 (2003); *Guzowski v Detroit Racing Ass'n, Inc*, 130 Mich App 322, 324-326; 343 NW2d 536 (1983).

## IV. REAL PARTY IN INTEREST

Joan argues that Mark was not the real party in interest for purposes of his claims concerning the ownership of the right to demand repayment of the loans from Dr. Rottenberg to the ranch entities. We agree.

Whether an individual is the real party in interest is a question of law that we review de novo. See *Rohde v Ann Arbor Pub Sch*, 265 Mich App 702, 705; 698 NW2d 402 (2005).

The probate court is a court of limited jurisdiction. *In re Lager Estate*, 286 Mich App 158, 162; 779 NW2d 310 (2009). The jurisdiction of the probate court is defined

by statute. Const 1963, art 6, § 15; *In re Wirsing*, 456 Mich 467, 472; 573 NW2d 51 (1998).

MCL 700.1302(b) provides, in relevant part, that the probate court has exclusive legal and equitable jurisdiction over "[a] proceeding that concerns the validity, internal affairs, or settlement of a trust; the administration, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary . . . ." In addition, the probate court has concurrent legal and equitable jurisdiction to "[d]etermine a property right or interest" with respect to a decedent's estate, trust, or protected individual. MCL 700.1303(1)(a). Without question, Mark is a "trust beneficiary" of the BR Trust. MCL 700.7103(*l*)(*i*); see also MCL 700.1103(d)(*i*). As a beneficiary, and therefore an "interested person," MCL 700.1105(c), Mark certainly had statutory standing in this case to invoke the probate court's jurisdiction with respect to the administration of the BR Trust, MCL 700.7201(1); MCL 700.7203(1).

However, although the principle of statutory standing overlaps significantly with the real-party-in-interest rule, they are distinct concepts. See *Kent v Northern California Regional Office of American Friends Serv Comm*, 497 F2d 1325, 1329 (CA 9, 1974). The principle of statutory standing is jurisdictional; if a party lacks statutory standing, then the court generally lacks jurisdiction to entertain the proceeding or reach the merits. *Miller v Allstate Ins Co*, 481 Mich 601, 608-612; 751 NW2d 463 (2008). In contrast, the real-party-in-interest rule is essentially a prudential limitation on a litigant's ability to raise the legal rights of another. See, e.g., *Elk Grove Unified Sch Dist v Newdow*, 542 US 1, 12; 124 S Ct 2301; 159 L Ed 2d 98 (2004); *Zurich Ins Co v Logitrans, Inc*, 297 F3d 528, 532 (CA 6, 2002).

"A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another." *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 95; 535 NW2d 529 (1995). The real-party-in-interest rule " 'requir[es] that the claim be prosecuted by the party who by the substantive law in question owns the claim asserted . . . .' " *Rite-Way Refuse Disposal, Inc v VanderPloeg*, 161 Mich App 274, 278; 409 NW2d 804 (1987) (citation omitted).

We conclude that Mark was not the proper party to pursue the instant claims concerning the ownership of the right to demand repayment of the loans from Dr. Rottenberg, which belonged exclusively to the trustee of the ENR Trust, Lauren Underwood. In general, "[a]n action must be prosecuted in the name of the real party in interest . . . ." MCR 2.201(B).[12] The essence of Mark's argument is that the right to demand repayment of the loans made by Dr. Rottenberg to the ranch entities was not gifted to Joan and that, among other things, the value of the outstanding loans should therefore be used to offset any distributive share to which Joan would otherwise be entitled. It is the duty of the trustee to administer the trust for the benefit of the beneficiaries, MCL 700.7801, to control and protect the property of the trust, MCL 700.7810, to enforce any claims of the trust, MCL 700.7812, and to marshal and collect outstanding trust property, MCL 700.7813(1). There can be no doubt that the trustee of the ENR Trust is the party who actually owns the claims asserted by Mark in this matter. See *Rite-Way*, 161 Mich App at 278; see also

[12] It is true that a trust proceeding, such as this, is not a "civil action." See MCR 5.101(A) and (B). But a proceeding is nonetheless one of the "forms of action" permitted in the probate court, MCR 5.101(A), and therefore constitutes an "action" for purposes of the real-party-in-interest rule of MCR 2.201(B), see *In re Brown*, 229 Mich App 496, 502; 582 NW2d 530 (1998); see also MCR 5.001(A).

*Kent*, 497 F2d at 1329. Because Mark was not the real party in interest, his claims should have been dismissed. See *Leite v Dow Chem Co*, 439 Mich 920 (1992).

### V. LITIGATING IN THE WRONG PROCEEDING

We also conclude that any issues concerning the status or ownership of the loans from Dr. Rottenberg to the ranch entities, and whether the right to demand repayment of these loans was ever gifted to Joan, should have been litigated exclusively in the ENR Trust proceedings.

Whether an issue has been litigated in the correct probate proceeding is a question of law. Questions of law are reviewed de novo on appeal. *Cowles v Bank West*, 476 Mich 1, 13; 719 NW2d 94 (2006); *In re Rudell Estate*, 286 Mich App 391, 403; 780 NW2d 884 (2009).

It is undisputed that the loans at issue in this matter were made solely by Dr. Rottenberg. Dr. Rottenberg therefore held the exclusive right to demand repayment of these loans during his lifetime. The right to demand repayment of a loan or debt is a chose in action, Black's Law Dictionary (7th ed), and therefore an item of intangible personal property, *Royal Oak Twp v City of Berkley*, 309 Mich 572, 580; 16 NW2d 83 (1944). Such a right survives death. MCL 600.2921. Accordingly, under the terms of Dr. Rottenberg's will, the right to demand repayment of the loans became an asset of the ENR Trust immediately upon Dr. Rottenberg's death.

We reiterate that Mrs. Rottenberg was, essentially, a lifetime income beneficiary of the two marital subtrusts only. However, even if the right to demand repayment of the loans from Dr. Rottenberg poured over into one of these two marital subtrusts, the most that could possibly have passed into the BR Trust, if anything at all, was the *accrued income* from the loans that would have

been payable to Mrs. Rottenberg during her lifetime.[13] As a preliminary matter, there was simply no evidence to establish that the right to demand repayment of the loans ever became an asset of one of the marital subtrusts rather than the Residuary Trust under the ENR Trust instrument. Nor was there evidence to establish that the right to demand repayment generated any *income* during Mrs. Rottenberg's lifetime. Lastly, there is no question that the balance of the right to demand repayment of the loans (i.e., whatever would have been left of this asset after the payment of any income that accrued during Mrs. Rottenberg's lifetime) remained an asset of the ENR Trust at all times and could not have, under any circumstances, passed into Mrs. Rottenberg's estate or the BR Trust.[14]

We fully acknowledge that "[a] proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and a determination regarding the validity, internal affairs, or settlement of a trust . . . ." MCL 700.7201(3). However, any questions concerning the ownership of the right to demand repayment of the loans from Dr. Rottenberg, and specifically whether this right was ever gifted to Joan, "relat[ed]" exclusively to the administration of the ENR Trust. See *id*. Indeed, any interest

[13] In general, income that accrues during the life of a lifetime income beneficiary, but is not marshaled and collected by the trustee until after the death of that beneficiary, passes into the estate of the lifetime income beneficiary rather than to the trust's remaindermen. See, e.g., Bogert, Trusts & Trustees (2d ed), § 818, pp 412, n 72; 1 Restatement Trusts, 2d, § 235A, p 570; *In re Appeal of New Britain Bank & Trust Co*, 39 Conn Supp 157, 160; 472 A2d 1305 (1983); *In re Davidson's Estate*, 287 Pa 354, 357; 135 A 130 (1926).

[14] As noted earlier, there was no evidence that Mrs. Rottenberg exercised any of the powers of appointment conferred upon her by the ENR Trust instrument. Importantly, she did not appoint the right to demand repayment of the loans to the BR Trust.

that the BR Trust has in the instant claims regarding the right to demand repayment of the loans from Dr. Rottenberg to the ranch entities is entirely derivative of the ENR Trust's interest in these same claims.[15] We conclude that any questions regarding the right to demand repayment of the loans from Dr. Rottenberg, and whether this right was ever gifted to Joan, should have been litigated exclusively in the ENR Trust proceedings and not in the BR Trust proceedings.

## VI. CONCLUSION

The question whether the right to demand repayment of the loans from Dr. Rottenberg to the ranch entities was gifted to Joan should not have been litigated in this case. Any claims pertaining to this question belong to the trustee of the ENR Trust and should have been litigated exclusively in the ENR Trust proceedings. We therefore vacate the probate court's order of April 29, 2010, and remand for further proceedings consistent with this opinion.

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[15] Of course, there is always a remote possibility that additional discovery in one of the other proceedings or civil actions pending before the probate court will show that the right to demand repayment of the loans did pour over into one of the two marital subtrusts under the ENR Trust instrument, that this right of repayment did generate income during Mrs. Rottenberg's lifetime that was neither collected nor paid out to her, and that the interest in any accrued income therefore passed into the BR Trust under the terms of Mrs. Rottenberg's will. But as Underwood aptly observed at oral argument before this Court, the trustee of the BR Trust would be entitled to proceed against the trustee of the ENR Trust should such facts come to light. See MCL 700.7813(1); MCL 700.7817(x); see also MCL 700.7812. Indeed, we note that the trustee of the BR Trust is specifically authorized to "take reasonable steps to locate trust property and to compel a former trustee *or other person* to deliver trust property . . . ." MCL 700.7813(1) (emphasis added). The trustee of the ENR Trust would certainly constitute a "person" covered by this statute.

In light of our foregoing conclusions, we decline to reach the merits of Joan's argument that the right to demand repayment of the loans was gifted to her by her father or, alternatively, that there remained a genuine issue of material fact concerning whether the right to demand repayment of the loans was gifted to her by her father.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, no party having prevailed in full.

FITZGERALD and K. F. KELLY, JJ., concurred with JANSEN, P.J.

WELLS FARGO BANK, NA v CHERRYLAND MALL LIMITED PARTNERSHIP (ON REMAND)

Docket No. 304682. Submitted October 26, 2012, at Lansing. Decided April 9, 2013, at 9:00 a.m.

Wells Fargo Bank, N.A., brought an action in the Grand Traverse Circuit Court against Cherryland Mall Limited Partnership, David Schostak (Schostak), and Schostak Brothers & Co., Inc., to recover a deficiency owed under the terms of a mortgage. Cherryland had obtained a commercial mortgage-backed securities (CMBS) loan, using a mall it owned as collateral. Schostak was the guarantor of the loan. The lender then transferred the loan and attendant loan documents to Wells Fargo. After Cherryland's failure to make a loan payment, Wells Fargo foreclosed on the property by advertisement. Wells Fargo was the successful bidder at the foreclosure sale with a bid of $6 million, which left a deficiency of roughly $2.1 million. Wells Fargo asserted that it was entitled to recover damages in the amount of the loan deficiency from both Schostak and Cherryland because Cherryland's insolvency constituted a failure to maintain its single-purpose-entity status as required by the loan documents. Wells Fargo moved for summary disposition on multiple grounds. The court, Philip E. Rodgers, Jr., J., granted Wells Fargo's motions in part, holding that as the guarantor on the mortgage, Schostak was liable for the loan deficiency. In addition, the court awarded attorney fees to Wells Fargo. Cherryland and Schostak appealed. The Court of Appeals affirmed, concluding that Cherryland's failure to remain solvent breached the covenant to maintain its status as a single purpose entity and triggered the full recourse provision of the mortgage. The Court determined that any failure to remain solvent, regardless of the reason, was a violation of the covenant. The Court, in response to the argument that the contracts should not be enforced because they are against public policy, noted that it was up to the Legislature to address matters of public policy. *Wells Fargo Bank, NA v Cherryland Mall Limited Partnership*, 295 Mich App 99 (2011). Defendants sought leave to appeal in the Supreme Court. While the application was pending, the Legislature passed the Nonrecourse Mortgage Loan Act (NMLA), MCL 445.1591 *et seq*., effective March 29, 2012, which retroactively prohibits a postclosing solvency covenant from

being used as a nonrecourse carveout or as a basis for any claim against a borrower, guarantor, or other surety on a nonrecourse loan. On September 26, 2012, the Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for reconsideration in light of the passage of the NMLA. *Wells Fargo Bank v Cherryland Mall Limited Partnership*, 493 Mich 859 (2012). On remand, the parties stipulated that the Attorney General could intervene in the action and the Court of Appeals granted the Attorney General's motion to intervene.

On remand, the Court of Appeals *held*:

1. To the extent that the provisions in the guarantee, which is one of the documents for a nonrecourse loan, purport to impose liability on Schostak as guarantor on the basis of the postclosing solvency covenant, they are invalid and unenforceable. The NMLA provides in MCL 445.1593(1) and (2) that a postclosing solvency covenant shall not be used, directly or indirectly, as a nonrecourse carveout or as the basis for any claim or action against any guarantor and that any provision in the documents for a nonrecourse loan that purports to use a nonrecourse carveout as the basis for a claim against a guarantor is invalid and unenforceable.

2. Whether a state statute violates the Contract Clause, US Const, art I, § 10, is determined by reference to a three-step inquiry. First, the court must determine whether the state law has operated as a substantial impairment of a contractual relationship. If it constitutes a substantial impairment, the court must look at whether the justification for the state law is based on a significant and legitimate public purpose. If a legitimate public purpose can be identified, the court looks at whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the adoption of the legislation. With respect to the third inquiry, as is customary in reviewing economic and social regulation, courts properly defer to legislative judgment regarding the necessity and reasonableness of a particular measure unless the state is one of the contracting parties.

3. There was a significant and legitimate public purpose for the NMLA. The remedy provided by the legislation is appropriate. Therefore, the Court of Appeals did not need to reach a conclusion on the substantial impairment question.

4. Although the NMLA will benefit Schostak, there is no evidence that the act was intended solely for his benefit.

5. That developers benefited when the Legislature, in enacting the NMLA, took action to stabilize the CMBS industry does not

undermine the NMLA because the purpose was not to benefit developers but to avert a broader economic problem of immense proportion in the interest of the public good. This was a legitimate public purpose that shows that the Legislature was properly exercising its police power by enacting the NMLA.

6. Although the NMLA invalidates the provisions in the loan documents that gave rise to plaintiff's entitlement to the deficiency, the remaining provisions of the lending documents remain in effect. Plaintiff failed to propose any lesser measure that could have accomplished the legislative objective. It is appropriate to conclude, in deference to the Legislature, that the Contract Clauses of the Michigan and United States Constitutions allow such legislation. Plaintiff is not entitled to the deficiency.

7. The right to substantive due process is violated when legislation is unreasonable and clearly arbitrary, having no substantial relationship to the health, safety, morals, and general welfare of the public. The retroactive aspects of economic legislation, as well as the prospective aspects, must meet the test of due process: a legitimate legislative purpose furthered by rational means. Michigan courts analyze whether a plaintiff's due process rights have been violated by determining whether the legislation bears a reasonable relation to a permissible legislative objective. Legislative acts adjusting the burdens and benefits of economic life come to a court with a presumption of constitutionality. The party challenging the legislation on due process grounds bears the burden of rebutting the presumption that there was a rational basis for the legislation. Where the legislative judgment is supported by any state of facts either known or which could reasonably be assumed, although such facts may be debatable, the judgment of the Legislature must be accepted. The means chosen by the Legislature to address the concerns about existing CMBS loans with postclosing solvency covenants, declaring the covenants invalid and unenforceable, were not arbitrary and rationally addressed the identified problem. There was no substantive due process violation.

8. When a new law makes it clear that it is retroactive, an appellate court must apply the law in reviewing judgments still on appeal that were rendered before the law was enacted and must alter the outcome accordingly.

9. The language of the stipulation the parties reached regarding the amount of damages, including costs, expenses, and attorney fees, that should be awarded should defendants lose on appeal is unambiguous. The parties agreed to an amount of $260,000 relative to the entire action and made no stipulation regarding the

amount due for any of the individual counts. The trial court erred by providing for an award of $260,000 in costs, expenses, and attorney fees when granting summary disposition with regard to count IV. Because there was no stipulation on that issue, the case must be remanded to the trial court for a determination whether plaintiff is entitled to costs, expenses, and attorney fees with respect to count IV.

Reversed and remanded.

1. MORTGAGES — NONRECOURSE MORTGAGE LOAN ACT.

The Nonrecourse Mortgage Loan Act applies to the enforcement and interpretation of all nonrecourse loan documents in existence on, or entered into on or after, March 29, 2012, the effective date of the act (MCL 445.1595).

2. CONSTITUTIONAL LAW — MORTGAGES — NONRECOURSE MORTGAGE LOAN ACT.

The Nonrecourse Mortgage Loan Act does not violate the Contract Clause or the Due Process Clause of the United States or Michigan Constitutions and does not violate the separation of powers doctrine contained in the Michigan Constitution (US Const, art I, § 10; US Const, Am XIV; Const 1963, art 1, §§ 10 and 17; Const 1963, art 3, § 2).

3. MORTGAGES — NONRECOURSE MORTGAGE LOAN ACT.

The Nonrecourse Mortgage Loan Act provides that a postclosing solvency covenant shall not be used, directly or indirectly, as a nonrecourse carveout or as the basis for any claim or action against any guarantor and that any provision in the documents for a nonrecourse loan that purports to use a nonrecourse carveout as the basis for a claim against a guarantor is invalid and unenforceable (MCL 445.1593[1] and [2]).

4. CONSTITUTIONAL LAW — CONTRACT CLAUSE — STATE STATUTES.

A three-step inquiry is employed in determining whether a state statute violates the Contract Clause; first, the court must determine whether the state law has operated as a substantial impairment of a contractual relationship; if it constitutes a substantial impairment, the court must look at whether the justification for the state law is based on a significant and legitimate public purpose; if a legitimate public purpose can be identified, the court must look at whether the adjustment of the rights and responsibilities of contracting parties is based on reasonable conditions and is of a character appropriate to the public purpose justifying the adoption of the legislation; with respect to the inquiry for the third

step, the court properly defers to the judgment of the Legislature regarding the necessity and reasonableness of a particular measure unless the state is one of the contracting parties (US Const, art I, § 10; Const 1963, art 1, § 10).

5. CONSTITUTIONAL LAW — MORTGAGES — NONRECOURSE MORTGAGE LOAN ACT.

The significant and legitimate public purpose of avoiding a broad and general economic problem of immense proportion supports the Legislature's exercise of its police power by enacting the Nonrecourse Mortgage Loan Act; the remedy provided by the act is appropriate (MCL 445.1591 *et seq*.).

6. CONSTITUTIONAL LAW — STATUTES — STATUTES AFFECTING ECONOMIC LIFE — PRESUMPTION OF CONSTITUTIONALITY.

Legislative acts adjusting the burdens and benefits of economic life come to the courts with a presumption of constitutionality; judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches if the legislation is supported by a legitimate legislative purpose furthered by rational means; a party challenging the legislation on due process grounds bears the burden of rebutting the presumption that there was a rational basis; the legislative judgment must be accepted when it is supported by any state of facts either known or which could reasonably be assumed, although such facts may be debatable.

7. STATUTES — RETROACTIVE STATUTES — APPLICATION TO JUDGMENTS ON APPEAL.

When a new law is clearly retroactive, an appellate court must apply the law in reviewing judgments still on appeal that were rendered before the law was enacted and must alter the outcome accordingly.

*Miller, Canfield, Paddock and Stone, P.L.C.* (by *Clifford W. Taylor*, *James L. Allen*, and *Dennis G. Bonucchi*), for plaintiff.

*Honigman Miller Schwartz and Cohn LLP* (by *John Pirich* and *I. W. Winsten*) for Cherryland Mall Limited Partnership and David Schostak.

*Bill Schuette*, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Christopher W. Braverman*, Assistant Attorney General, for the Attorney General.

Amici Curiae:

*Clark Hill PLC* (by *Paul S. Magy* and *Matthew W. Schlegel*) for the Building Owners and Managers Association International, Building Owners and Managers Association of Metro Detroit, Building Owners and Managers Association of Mid-Michigan, Building Owners and Managers Association West Michigan, Apartment Association of Michigan, and Construction Association of Michigan.

ON REMAND

Before: CAVANAGH, P.J., and SAWYER and METER, JJ.

PER CURIAM. This case is before us on remand from our Supreme Court for reconsideration of our prior decision in this matter in light of the Legislature's recent passage of the Nonrecourse Mortgage Loan Act, 2012 PA 67, MCL 445.1591 *et seq*. (the NMLA or Act 67). *Wells Fargo Bank v Cherryland Mall Ltd Partnership*, 493 Mich 859 (2012). On reconsideration, we reject plaintiff's constitutional challenges to the NMLA and hold that it bars plaintiff's claims.

## I. FACTS AND PROCEDURAL HISTORY

The facts are set forth at length in our original opinion, *Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership*, 295 Mich App 99; 812 NW2d 799 (2011). Briefly, defendant Cherryland Mall Limited Partnership secured an $8.7 million commercial mortgage-backed securities (CMBS) loan using a mall it owned as collateral. Defendant David Schostak signed a guaranty. Generally, CMBS financing involves the lender agreeing not to pursue recourse liability against the borrower or its owner; in return, the asset used as collateral, which

is known as "a single purpose entity," as well as money that flows from that asset, is isolated pursuant to "separateness covenants" and narrow limitations on the lender's agreement not to pursue recourse liability. These limitations set forth in "limited recourse provisions," are referred to as "recourse triggers" or "carveouts," and are generally related to "bad acts."

In this case, plaintiff ultimately commenced foreclosure by advertisement when defendant Cherryland failed to make a payment or payments. Plaintiff successfully bid $6 million, leaving a roughly $2.1 million deficiency. It sued defendants seeking to recover the deficiency. Relative to the deficiency, defendants appealed the trial court's holding that defendant Schostak, "as guarantor, was liable for the entire loan deficiency on the basis of the trial court's conclusion that insolvency was a violation of Cherryland's [single purpose entity] status . . . ." *Id*. at 107.

This Court affirmed, concluding that Cherryland's failure to remain solvent "breached the covenant to maintain its status as [a single purpose entity] and triggered the full recourse provision of the mortgage." *Id*. at 126. Paragraph 13 of the note provides:

> Notwithstanding anything to the contrary in this Note or any of the Loan Documents, . . . the Debt shall be fully recourse to Borrower in the event that . . . Borrower fails to maintain its status as a single purpose entity as required by, and in accordance with the terms and provisions of the Mortgage . . . . [*Id*. at 110.]

Paragraph 9 of the mortgage provides, in pertinent part:

> **Single Purpose Entity/Separateness**. Mortgagor covenants and agrees as follows:
>
> * * *

> (f) Mortgagor is and will remain solvent and Mortgagor will pay its debts and liabilities (including, as applicable, shared personnel and overhead expenses) from its assets as the same shall become due.

Defendant Schostak had signed a guaranty that included the following provision:

> Notwithstanding anything to the contrary in the Note or any of the Loan Documents, . . . (B) Guarantor shall be liable for the full amount of the Debt and all obligations of Borrower to Lender under the Loan Documents in the event that: . . . (iii) Borrower fails to maintain its status as a single purpose entity as required by, and in accordance with the terms and provisions of the Mortgage . . . .

This Court concluded, consistent with the trial court, that ¶ 9(f) was a single purpose entity requirement and that insolvency was a violation of single purpose entity status. *Wells Fargo Bank, NA*, 295 Mich App at 114-125. Further, any failure to remain solvent, regardless of the reason, was a violation. *Id*. at 125.

This Court acknowledged the argument that its holding would "indicate economic disaster for the business community in Michigan," but concluded that its job was not "to save litigants from their bad bargains or their failure to read and understand the terms of a contract." *Id*. at 126. Moreover, in response to the argument that the contracts should not be enforced because they are against public policy, we noted that it was up to the Legislature to address matters of public policy. *Id*. at 127.

Defendants sought leave to appeal in the Supreme Court. While the application was pending, the Legislature passed the NMLA.

## II. THE NMLA

The NMLA applies "to the enforcement and interpretation of all nonrecourse loan documents in exist-

ence on, or entered into on or after, the effective date of [the NMLA]," which was immediately effective on March 29, 2012. MCL 445.1595. 2012 PA 67, enacting § 1, provides, in pertinent part:

> The legislature recognizes that the use of a post closing solvency covenant as a nonrecourse carveout, or an interpretation of any provision in a loan document that results in a determination that a post closing solvency covenant is a nonrecourse carveout, is inconsistent with this act and the nature of a nonrecourse loan; is an unfair and deceptive business practice and against public policy; and should not be enforced.

MCL 445.1593, the operative provision at issue, provides:

> (1) A post closing solvency covenant shall not be used, directly or indirectly, as a nonrecourse carveout or as the basis for any claim or action against a borrower or any guarantor or other surety on a nonrecourse loan.
>
> (2) A provision in the documents for a nonrecourse loan that does not comply with subsection (1) is invalid and unenforceable.

"Post closing solvency covenant" is defined as

> any provision of the loan documents for a nonrecourse loan, whether expressed as a covenant, representation, warranty, or default, that relates solely to the solvency of the borrower, including, without limitation, a provision requiring that the borrower maintain adequate capital or have the ability to pay its debts, with respect to any period of time after the date the loan is initially funded. The term does not include a covenant not to file a voluntary bankruptcy or other voluntary insolvency proceeding or not to collude in an involuntary proceeding. [MCL 445.1592(d).]

## III. ANALYSIS

Plaintiff argues that the NMLA did not invalidate the guaranty because in the guaranty defendant Schostak

relinquished his right to future defenses and waived any statutory rights regarding the invalidity, illegality, or unenforceability of the guaranty. Further, plaintiff argues that the NMLA violates: (1) the Contract Clauses of the United States and Michigan Constitutions, US Const, art I, § 10 and Const 1963, art 1, § 10, (2) the due process protections of US Const, Am XIV and Const 1963, art 1, § 17, and (3) the separation of powers doctrine, Const 1963, art 3, § 2. We conclude that the guaranty provisions are invalid and unenforceable under the NMLA and that the constitutional challenges to the act must fail.

### A. THE GUARANTY

Plaintiff argues that defendant Schostak agreed that his liabilities and obligations were "unconditional," "irrevocable," and "absolute" in §§ 1.1 and 1.3 of the guaranty. Further, Schostak relinquished his right to "any existing or future offset, claim or defense" in §§ 1.4 and 2.10 of the guaranty, including a defense based on any statutory right. In article II and § 2.4 of the guarantee, Schostak waived any statutory rights regarding the "invalidity, illegality or unenforceability of . . . any document or agreement executed in connection with the Guaranteed Obligations," agreeing that his obligations would not be "released, diminished, impaired, reduced or adversely affected" even if Cherryland had valid defenses. Assuming for purposes of analysis that these provisions would contractually bind defendant Schostak, we nonetheless conclude that they are invalid and unenforceable.

The guaranty is being invoked because, since it became insolvent, Cherryland "fail[ed] to maintain its status as a single purpose entity" as required by the mortgage. Again, MCL 445.1593(1) and (2) of the

NMLA provides that "[a] post closing solvency covenant shall not be used, *directly or indirectly*, as a nonrecourse carveout or as the basis for any claim or action against . . . any guarantor" and that any provision in the documents for a nonrecourse loan that purports to use a nonrecourse carveout as the basis for a claim against a guarantor "is invalid and unenforceable." (Emphasis added.) To the extent that provisions in the guaranty, which is one of the documents for a nonrecourse loan, purport to impose liability on defendant Schostak as guarantor on the basis of the postclosing solvency covenant, they are invalid and unenforceable.

B. CONTRACT CLAUSES

Preliminarily, we note that " '[s]tatutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.' " *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 307; 806 NW2d 683 (2011), quoting *Taylor v Gate Pharm*, 468 Mich 1, 6; 658 NW2d 127 (2003). US Const, art I, § 10 states, in part: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." Similarly, Const 1963, art 1, § 10 provides: "No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." The "state constitutional provision is not interpreted more expansively than its federal counterpart." *Attorney General v Michigan Pub Serv Comm*, 249 Mich App 424, 434; 642 NW2d 691 (2002); see also *AFT Mich v Michigan*, 297 Mich App 597, 609; 825 NW2d 595 (2012) ("the two provisions are interpreted similarly"). "It has been said that the purpose of the Contract Clause is to protect bargains reached by

parties by prohibiting states from enacting laws that interfere with preexisting contractual arrangements." *In re Certified Question*, 447 Mich 765, 777; 527 NW2d 468 (1994).

In arguing that the NMLA is an unconstitutional impairment of contract, plaintiff relies primarily on *Sturges v Crowninshield*, 17 US (4 Wheat) 122, 199-201; 4 L Ed 529 (1819), and *Walker v Whitehead*, 83 US (16 Wall) 314, 318; 21 L Ed 357 (1873), which held that states could change a remedy if no substantial contract rights were impaired but could not discharge the obligations of a debtor. However, in *Blue Cross & Blue Shield of Mich v Governor*, 422 Mich 1; 367 NW2d 1 (1985), the Court recognized that there has been a movement away from this absolute bar to contract impairment. The Court stated, *id*. at 20:

> Beginning with the landmark case of *Home Building & Loan Ass'n v Blaisdell*, 290 US 398; 54 S Ct 231; 78 L Ed 413 (1934), the modern United States Supreme Court has construed the Contract Clause as not prohibiting a state from exercising its police power to abrogate private or public contracts if reasonably related to remedying a social or economic need of the community. Under modern Contract Clause analysis, a balancing approach has been adopted by the courts, weighing the degree of the impairment of the contractual rights and obligations of the parties against the justification for the impairment as an act of the state's police power to implement legislation for a legitimate public purpose. Michigan courts have followed this lead. See *Van Slooten v Larsen*, 410 Mich 21; 299 NW2d 704 (1980) (see in particular Justice LEVIN's dissenting opinion); *Metropolitan Funeral System Ass'n v Ins Comm'r*, 331 Mich 185, 194 *ff*.; 49 NW2d 131 (1951), and federal cases cited therein.

Plaintiff maintains that the balancing test applies only to retroactive state laws that "impair contractual obligations not involving the impairment of debts," and

that *Sturges* and *Walker* still control when the issue is debt relief. However, in *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 503; 107 S Ct 1232; 94 L Ed 2d 472 (1987), the Court noted that, while the primary focus of the Contract Clause was "pre-existing debtor-creditor relationships that obligors were unable to satisfy," "[e]ven in such cases, the Court has refused to give the Clause a literal reading." Currently, whether a state statute violates the Contract Clause is determined by reference to a three-step inquiry set forth in *Energy Reserves Group, Inc v Kansas Power & Light Co*, 459 US 400; 103 S Ct 697; 74 L Ed 2d 569 (1983).[1] First, courts must determine whether the state law has operated as a substantial impairment of a contractual relationship. *Id*. at 411. If it constitutes a substantial impairment, the court must look at whether the justification for the state law is based on a significant and legitimate public purpose. *Id*. at 411-412. If a legitimate public purpose can be identified, the court looks at whether the adjustment of " 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.' " *Id*. at 412, quoting *United States Trust Co of New York v New Jersey*, 431 US 1, 22; 97 S Ct 1505; 52 L Ed 2d 92 (1977). With respect to this third inquiry, " '[as] is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure' " unless the state is one of the contracting

[1] See also *In re Certified Question*, 447 Mich at 777. Plaintiff maintains that the obligations at issue in *Energy Reserves Group, Inc*, did not involve the impairment of debts but, in setting forth the framework for analysis of Contract Clause issues, the Court did not qualify application on the basis of the nature of the contract right impaired.

parties. *Energy Reserves Group, Inc*, 459 US at 412-413, quoting *United States Trust Co of New York*, 431 US at 22-23.

1. SUBSTANTIAL IMPAIRMENT

Defendants assert that the original parties to the CMBS loan at issue understood and intended at the time of contracting that the loan would be nonrecourse in the event of insolvency. In *Energy Reserves Group, Inc*, 459 US at 411, the Court noted that "state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment." However, despite indications that this may have been the original parties' intent, this Court previously concluded that "the mortgage, as incorporated into the note, unambiguously required Cherryland to remain solvent in order to maintain its [single purpose entity] status." *Wells Fargo Bank, NA*, 295 Mich App at 128. Moreover, defendant Schostak unambiguously agreed that he would "be liable for the full amount of the Debt and all obligations of Borrower to Lender under the Loan Documents" if Cherryland failed "to maintain its status as a single purpose entity as required by, and in accordance with the terms and provisions of the Mortgage . . . ." We question the sufficiency of the evidence to summarily state that plaintiff's reasonable expectation, despite unambiguous contract language to the contrary, was that the loan would remain nonrecourse in the event of insolvency. Moreover, we note the absence of guidance on whether the assignee's reliance on the contract would give way to the original parties' intent for purposes of discerning whether there has been a substantial impairment within the meaning of the Contract Clause. However, for the reasons that follow we conclude that there was a significant and legitimate public purpose for the NMLA and that the

remedy provided by the legislation was appropriate. Accordingly, we need not reach a conclusion on the substantial impairment question.

2. SIGNIFICANT AND LEGITIMATE PUBLIC PURPOSE

On February 29, 2012, there was a meeting of the Senate Economic Development Committee at which Senate Bill 992, the precursor to the NMLA, was discussed.[2] At the meeting, it was represented that the original opinion in this case had changed the nature of nonrecourse mortgage loans. It was also represented that: (1) the proposed act would "set the course where it was intended to be," (2) allowing nonrecourse loans to become recourse due to insolvency "would irreparably harm the, the current environment for investment in Michigan," (3) the legislation would maintain the status quo, and (4) the failure to pass the proposed act "would basically eliminate nonrecourse loans in Michigan," leading to a collapse of nonrecourse lending, a decrease in tax revenues, and "a major foreclosure issue." Transcript of hearing on SB 992, Senate Economic Development Committee (February 29, 2012), pp 5, 8, 12, 18-19. Further, a commercial mortgage banking firm representative testified that over 50 percent of its $2.8 billion in current nonrecourse loans could qualify as insolvent, making loans recourse, which would be catastrophic. *Id*. at 19.

Plaintiff characterizes this reaction and defendants' representations as the " 'Sky is Falling' Hyperbole."

[2] The minutes of the February 29, 2012, committee meeting can be found at <http://www.senate.michigan.gov/committees/Default.aspx?commid=50>. The minutes indicate that there was an audio recording of the meeting "available upon request for a minimum fee." Defendants have provided an unofficial transcript of the meeting. Plaintiff has not raised any issue regarding the accuracy of this transcript.

Plaintiff asserts that not all nonrecourse loans have nonrecourse carveouts for insolvency, and that defendants "have manufactured this trumped-up industry crisis" "to rescue [defendant] Schostak." However, as noted in the original opinion in this case, " 'the Legislature possesses superior tools and means for gathering facts, data, and opinion and assessing the will of the public.' " *Wells Fargo Bank, NA*, 295 Mich App at 127, quoting *Woodman v Kera LLC*, 486 Mich 228, 246; 785 NW2d 1 (2010) (opinion by YOUNG, J.). Moreover, while the NMLA will benefit defendant Schostak, we have found no evidence that the act was intended solely for his benefit.

At the hearing before the Senate Economic Development Committee, there was no quantification of the actual number of CMBS loans that might have language making a loan recourse in the event of insolvency. However, the testimony suggested that the affected loans would by no means be limited to those currently involved in litigation. For example, developers testified that they would be unable to get necessary financing for continued development because, when applying for financing, they would have to list contingent liabilities based on potential deficiencies arising from postclosing solvency covenants. Transcript of Hearing on SB 992, Senate Economic Development Committee (February 29, 2012), pp 12, 14, 18. Moreover, Senator Arlan Meekhof, who sponsored the bill, testified:

> Many of the loans that are existing, that have already been written, even if they change the language in the future in nonrecourse loans will make many of the borrowers unfinanceable because there will be a concern by the lenders that there would be a stringing liability that was never expected on their financial statement. [*Id*. at 10.]

Further, there was testimony indicating that loan documents for CMBS loans were standardized and routinely

included the problematic language. Given this testimony, there is no support for plaintiff's contention that the loans affected by this legislation were relatively limited. We have no reason to question the representations that there will be a collapse of nonrecourse lending in Michigan if CMBS loans routinely become recourse and that tax revenues, as well as foreclosures, will be affected. And we note that *Energy Reserves Group, Inc*, 459 US at 412, identifies "remedying of a broad and general social or economic problem" as a "significant and legitimate public purpose . . . ."

Nonetheless, *Energy Reserves Group, Inc*, also indicates that "[t]he requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." *Id*. This legislation benefits defendant Schostak. Plaintiff suggests that defendant Schostak used political influence to get the legislation passed for his individual advantage.[3] If true, this would militate in favor of a finding that the bill was intended to benefit special interests. However, the testimony before the Senate Economic Development Committee suggests that the legislation would have far greater impact than just benefiting defendant Schostak.[4]

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[3] Plaintiff represents that defendant David Schostak is cochief executive officer of defendant Schostak Brothers & Co., Inc., and that Robert Schostak is cochairman and cochief executive officer. Plaintiff further represents that Robert Schostak is "a high ranking Republican Party leader in Michigan, with many years of involvement in assisting the party's candidates to gain election in the legislature." We note that Robert Schostak has been chairman of the Michigan Republican Party since January 2011, was finance chairman through the 2010 election cycle, and has served on campaign fundraising teams for prominent Republicans. See <http://www.migop.org/index.php/about/party-leadership/>.

[4] It is noteworthy that the legislation was opposed in the Senate by five senators: two (of 12) democrats and three (of 26) republicans. 2012 Journal of the Senate 23 (March 7, 2012), p 321. In the House, it was

The legislation does benefit commercial developers generally, a group that would constitute a "special interest." However, it appears that the Legislature was motivated by a broad and general economic problem, one alluded to in our prior opinion:

> We recognize that our interpretation seems incongruent with the perceived nature of a nonrecourse debt and are cognizant of the amici curiae's arguments and calculations that, if accurate, indicate economic disaster for the business community in Michigan . . . . [*Wells Fargo Bank, NA*, 295 Mich App at 126.]

That developers benefited when the Legislature took action to stabilize the CMBS industry will not undermine the legislation because the purpose was not to benefit developers but to avert a broader economic problem of immense proportion in the interest of the public good. This was a legitimate public purpose that shows that the Legislature was properly exercising its police power.

3. REASONABLE AND APPROPRIATE CONDITIONS

In *Energy Reserves Group, Inc*, the Supreme Court held that " 'courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure' " when the contract is between private parties. *Energy Reserves Group, Inc*, 459 US at 412-413 (citation omitted); see also *Keystone Bituminous Coal Ass'n*, 480 US at 504-505. In the present case, the concern was that economic development in this market would significantly diminish because lenders would not extend loans to those commercial developers with contingent liabilities arising from

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passed by 97 votes to 12 votes; the nays were from 10 republicans and two democrats. 2012 Journal of the House 29 (March 20, 2012), p 427. The legislation had bipartisan support.

existing CMBS loans with the provision allowing them to become recourse in the event of insolvency. The legislation in effect erased the concern by making the provision invalid and unenforceable. The holding in *Energy Reserves Group, Inc*, included that the adjustment to " 'the rights and responsibilities of contracting parties [must be based] upon reasonable conditions and [be] of a character appropriate to the public purpose justifying [the legislation's] adoption.' " *Energy Reserves Group*, *Inc*, 459 US at 412, quoting *United States Trust Co of New York*, 431 US at 22. While this measure invalidates the provisions that gave rise to plaintiff's entitlement to the deficiency, we note that the remaining provisions of the lending documents remain in effect. Plaintiff has not proposed any lesser measure that could have accomplished the legislative objective. Thus, in deference to the Legislature, we conclude that the Contract Clauses allow for such legislation.

### C. SUBSTANTIVE DUE PROCESS

The Fourteenth Amendment of the United States Constitution states that no "State [shall] deprive any person of life, liberty, or property, without due process of law . . . ." Similarly, Const 1963, art 1, § 17 provides that no person shall "be deprived of life, liberty or property, without due process of law."

> [A]lthough the text of the Due Process Clauses provides only procedural protections, due process also has a substantive component that protects individual liberty and property interests from arbitrary government actions regardless of the fairness of any implementing procedures. . . . The right to substantive due process is violated when legislation is unreasonable and clearly arbitrary, having no substantial relationship to the health, safety,

> morals, and general welfare of the public. [*Bonner v City of Brighton*, 298 Mich App 693, 705-706; 828 NW2d 408 (2012).[5]

In *Gen Motors Corp v Romein*, 503 US 181; 112 S Ct 1105; 117 L Ed 2d 328 (1992), the Court stated: "Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions. For this reason '[t]he retroactive aspects of [economic] legislation, as well as the prospective aspects, must meet the test of due process': a legitimate legislative purpose furthered by rational means." *Id*. at 191, quoting *Pension Benefit Guaranty Corp v R A Gray & Co*, 467 US 717, 730; 104 S Ct 2709; 81 L Ed 2d 601 (1984). Similarly, Michigan Courts "analyze whether a plaintiff's due process rights have been violated [by determining] 'whether the legislation bears a reasonable relation to a permissible legislative objective.' " *Phillips v Mirac, Inc*, 470 Mich 415, 436; 685 NW2d 174 (2004), quoting *Detroit v Qualls*, 434 Mich 340, 366-367 n 49; 454 NW2d 374 (1990). In *Kentucky Div, Horsemen's Benevolent & Protective Ass'n, Inc v Turfway Park Racing Ass'n, Inc*, 20 F3d 1406, 1414 (CA 6, 1994), the court stated:

> Because "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality," *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 49 L. Ed. 2d 752, 96 S. Ct. 2882 (1976), "judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches," *Pension Benefit Guaranty Corp.* [, 467 US

[5] When a state law is challenged on substantive due process grounds, the plaintiff need not demonstrate a deprivation of a liberty or property interest. See *American Express Travel Related Servs Co, Inc v Kentucky*, 641 F3d 685, 688-689 (CA 6, 2011).

> at 729], if the "statute is supported by a legitimate legislative purpose furthered by rational means." *Id*. In fact, Congress has "absolutely no obligation to select the scheme that a court later would find to be the fairest, but simply one that was rational and not arbitrary." *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.Co.*, 470 U.S. 451, 477, 84 L. Ed. 2d 432, 105 S. Ct. 1441 (1985).

The party challenging the legislation on due process grounds bears the burden of rebutting the presumption that there was a rational basis. *Qualls*, 434 Mich at 366. Moreover, " 'where the legislative judgment *is supported by "any state of facts either known or which could reasonably be assumed,"* although such facts may be "debatable," the legislative judgment must be accepted. *Carolene Products Co v Thompson*, 276 Mich 172, 178; 267 NW 608 (1936).' " *Qualls*, 434 Mich at 366, quoting *Shavers v Attorney General*, 402 Mich 554, 614; 267 NW2d 72 (1978). Stated more emphatically:

> [T]he party challenging a legislative enactment subject to rational basis review must " 'negative every conceivable basis which might support it.' " *See, e.g.*, *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (1973) (quoting *Madden v. Kentucky*, 309 U.S. 83, 88, 60 S. Ct. 406, 84 L. Ed. 590 (1940)). "Under rational basis review, it is 'constitutionally irrelevant [what] reasoning in fact underlay the legislative decision.' " *Craigmiles* [ *v Giles*, 312 F3d 220, 224 (CA 6, 2002)] (alteration in original) (quoting *R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179, 101 S. Ct. 453, 66 L. Ed. 2d 368 (1980)). "[W]e will be satisfied with the government's 'rational speculation' linking the regulation to a legitimate purpose, even 'unsupported by evidence or empirical data.' " *Id*. (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)). Thus, if a statute can be upheld under any plausible justification offered by the state, or even hypothesized by the court, it survives rational-basis scrutiny. *See Berger* [ *v City of Mayfield Heights*, 154 F3d 621, 624-626 (CA 6, 1998)] (speculating as

> to the City Council's possible motivations for passing the challenged ordinance). [*American Express Travel Related Servs Co, Inc v Kentucky*, 641 F3d 685, 690 (CA 6, 2011).]

Here, there were concerns that existing CMBS loans with postclosing solvency covenants would result in commercial developers not qualifying for financing to pursue continued economic development in Michigan, that tax revenues would be affected, and that foreclosures would increase, all during a period of economic recovery in this state. The means chosen to address these concerns, declaring the covenants invalid and unenforceable, were not arbitrary. Rather, they rationally addressed the identified problem. There was no substantive due process violation.

### D. SEPARATION OF POWERS

Plaintiff argues that the NMLA violates the Separation of Powers Clause, Const 1963, art 3, § 2, by depriving this Court of its exclusive power to interpret and enforce the contract in the case pending before it. Const 1963, art 3, § 2 states that "[t]he powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." In *Kyser v Kasson Twp*, 486 Mich 514, 535; 786 NW2d 543 (2010) (finding that the judiciary had interfered with the legislative zoning powers of a township), the Court quoted *Massachusetts v Mellon*, 262 US 447, 488; 43 S Ct 597; 67 L Ed 1078 (1923), explaining that

> "[t]he functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before

> the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other."

In *Detroit Mayor v Arms Technology, Inc*, 258 Mich App 48; 669 NW2d 845 (2003), the plaintiffs brought public nuisance and negligence actions against the defendants relative to the marketing and distribution of firearms. The trial court dismissed the negligence claims, but held that the nuisance claims were viable and that MCL 123.1102, which prohibits local regulation of firearms, did not prohibit the plaintiffs' claims. While the actions were pending, the Legislature passed MCL 28.435, subsection (9) of which reserved the bringing of such actions to the state and expressly barred a political subdivision from bringing such an action. Further, subsection (13) provided:

> Subsections (9) through (11) are intended only to clarify the current status of the law in this state, are remedial in nature, and, therefore, apply to a civil action pending on the effective date of this act.

This Court held:

> At its core, plaintiffs' separation-of-powers challenge hinges on the fact that the enactment of MCL 28.435(9)-(13) effectively overrides the trial court's finding that plaintiffs are not prohibited by MCL 123.1102 from bringing this action. Plaintiffs vigorously assert that this statutory enactment "overturns a judicial decision" or, alternatively, "seeks to compel a judicial decision in favor of defendants." We find plaintiffs' arguments to be misplaced.
>
> First, we note that the trial court's ruling regarding MCL 123.1102 did not constitute a final judgment because it did not dispose of all claims and adjudicate all the rights and liabilities of the parties. MCR 7.202(7)(a)(i); *Allied Electric Supply Co, Inc v Tenaglia*, 461 Mich 285, 288; 602 NW2d 572 (1999). Because the trial court's order was not a final judgment that the statute required to be reopened,

> the order was subject to revision by the Legislature[.] [*Detroit Mayor*, 258 Mich App at 65.]

Quoting *Plaut v Spendthrift Farm, Inc*, 514 US 211, 226-227; 115 S Ct 1447; 131 L Ed 2d 328 (1995), the Court explained:

> "Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly. See *United States v. Schooner Peggy*, 5 U.S. 103, 1 Cranch 103, 2 L. Ed. 49 (1801); *Landgraf v. USI Film Products*, 511 U.S. 244, 273-280, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994). . . . [A] distinction between judgments from which all appeals have been foregone or completed, and judgments that remain on appeal (or subject to being appealed), is implicit in what Article III creates: not a batch of unconnected courts, but a judicial *department* composed of 'inferior Courts' and 'one supreme Court.' Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole. It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must 'decide according to existing laws.' *Schooner Peggy*, *supra*, at 109." [*Detroit Mayor*, 258 Mich App at 65-66.]

This Court concluded, *id*. at 66,

> consistent with the principles articulated in *Plaut*, that plaintiffs cannot show that the enactment of MCL 28.435 violates the Michigan Constitution simply because it was enacted after the trial court ruled on the applicability of MCL 123.1102.

Plaintiff suggests that *Plaut* is inapplicable because it involved Article III federal courts. However, *Detroit Mayor* indicates that a state court would be required to

apply retroactive legislation to a pending case as long as the appeal process is ongoing.

Plaintiff also argues that, to the extent that the Legislature can pass retroactive legislation clarifying a law it previously enacted, it cannot retroactively interpret a private contract it had no role in drafting. Plaintiff points out that defendants have cited no cases "in which a Michigan court blessed a statute directing the outcome of an appeal of a judgment enforcing a private contract right." However, the legislation does not "interpret" the contract or direct this Court or any court to do anything. It declares that the postclosing solvency covenant is invalid, unenforceable, and against public policy. This may have the effect of invalidating plaintiff's entitlements based on the contract, but if so it will be because the courts apply the new law, not because the Legislature has directly dictated the outcome in this case.

## IV. ATTORNEY FEES AND COSTS

The parties reached a stipulation regarding the amount of damages should defendants lose on appeal. The stipulation provided for a $260,000 award for costs and expenses, including attorney fees, but defendants claimed that they agreed to pay this amount only if plaintiff prevailed on the claim for the roughly $2.1 million deficiency. The trial court agreed with plaintiff that, pursuant to the stipulation, plaintiff was entitled to the award of $260,000 on the basis of the success with "Motion No. 4"; this motion dealt with an entitlement to $61,958 from defendant Schostak for a misapplication of rents. In the original opinion in this case, we determined that it was unnecessary to address this issue because we held that plaintiff was entitled to the deficiency. Because we have concluded on remand that

plaintiff is not entitled to the deficiency, we must now reach the merits of this issue.

> "A 'stipulation,' . . . is an agreement, admission, or concession made in a judicial proceeding by the parties or their attorneys, respecting some matter incident thereto. Its purpose is generally stated to be the avoidance of delay, trouble, and expense." [*Eaton Co Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 378-379; 521 NW2d 847 (1994), quoting 73 Am Jur 2d, Stipulations, § 1, p 536.]

"Stipulated orders that are accepted by the trial court are generally construed under the same rules of construction as contracts." *Phillips v Jordan*, 241 Mich App 17, 21; 614 NW2d 183 (2000). " '[W]hen parties have freely established their mutual rights and obligations through the formation of unambiguous contracts, the law requires this Court to enforce the terms and conditions contained in such contracts, if the contract is not "contrary to public policy." ' " *Holmes v Holmes*, 281 Mich App 575, 594; 760 NW2d 300 (2008), quoting *Bloomfield Estates Improvement Ass'n, Inc v Birmingham*, 479 Mich 206, 213; 737 NW2d 670 (2007). "A contract must be interpreted according to its plain and ordinary meaning." *Holmes*, 281 Mich App at 593.

> "Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. The language of a contract should be given its ordinary and plain meaning." [*Id*. at 594, quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997) (citations omitted).]

In this case, the stipulation was placed on the record. The first paragraph established the deficiency amount as being $2,142,697.86 and provided "that the sum of $260,000 is the reasonable amount of legal costs and expenses, including reasonable attorneys fees in prosecuting this action through the date of entry of the judgment only." The next paragraph established that judgment on count I would be entered against defendant Cherryland in the same amount as against the guarantor and summarized the dispositions of counts II through V, including the disposition of count IV regarding the "assignment of rents." Paragraph 3 addressed the disposition of count VI and in ¶ 4, there was an agreement "not to make any claims to the receiver for recovery of any or all portion of the fees ordered to be disgorged under motion Number 5 ruled by the Court" and that "this amount shall be credited against the judgment upon payment."

Considering the stipulation in its entirety, we conclude that the language is unambiguous. The parties agreed to an amount of $260,000 relative to the entire action and made no stipulation regarding the amount due for any of the individual counts. Indeed, the issue of costs, expenses, and attorney fees was addressed at the outset before any of the individual counts were mentioned. There is simply nothing in this stipulation that indicates an agreement to $260,000 in costs, expenses, and attorney fees for count IV. Consequently, the trial court erred by providing for an award of $260,000 in costs, expenses, and attorney fees in the order granting summary disposition with regard to count IV. Because there was no stipulation on that issue, we remand for a determination whether plaintiff is entitled to costs, expenses, and attorney fees with respect to count IV.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

CAVANAGH, P.J., and SAWYER and METER, JJ., concurred.

C D BARNES ASSOCIATES, INC v STAR HEAVEN, LLC

Docket No. 300263. Submitted September 5, 2012, at Grand Rapids. Decided April 11, 2013, at 9:00 a.m. Leave to appeal sought.

C. D. Barnes Associates, Inc., brought an action in the Ottawa Circuit Court against Star Heaven, L.L.C., David Findling, and others, including Flagstar Bank, FSB, seeking among other things to foreclose on its claims of lien under the Construction Lien Act (CLA), MCL 570.1101 *et seq*. The action arose out of a failed construction project undertaken by Star Heaven for which Flagstar provided mortgage financing and Barnes served as the general contractor. Barnes had performed its first physical improvement to the property for Star Heaven in August 2005. In October 2005, Star Heaven filed a notice of commencement under MCL 570.1108 using a metes and bounds description of the property. In May 2006, Barnes executed a sworn statement under MCL 570.1110(4) that the property was free from claims of construction liens. Also in May 2006, Star Heaven recorded a master deed, which redefined the project as a condominium project. Shortly thereafter, Flagstar's loans to Star Heaven closed, and Flagstar recorded its mortgage. Star Heaven subsequently amended the master deed to designate individual condominium units, among other things. Star Heaven paid most of Barnes's invoices, but left seven, totaling $361,000, unpaid. Barnes last provided labor and materials to the site in March 2008. In May 2008, Barnes recorded nine separate claims of lien for the unpaid amount. Six referred to particular individual units within the project, and the other three were filed against the overall project and used the metes and bounds description for the entire property set forth in the notice of commencement. In December 2008, Star Heaven assigned all of its interests in the property to Findling for the purpose of liquidating the assets and distributing the proceeds to creditors. After Barnes filed this action in May 2009, Flagstar contested the priority of Barnes's construction lien over its mortgage. The court, Calvin L. Bosman, J., entered a default against Star Heaven, and Barnes moved for partial summary disposition on the issue of the priority of its lien over Flagstar's mortgage. The court granted Barnes's motion but gave Flagstar 30 days to locate a subordination agreement allegedly relevant to priority and move to set aside the order. Flagstar

subsequently moved to modify, amend, or vacate the summary disposition order, and Barnes moved for entry of a foreclosure judgment that included the unpaid amount and costs and attorney fees. The court denied Flagstar's motion and granted Barnes's motion in part. The court concluded that the pendency of another action brought by Findling before a different judge precluded the entry of a foreclosure judgment, but the court determined that the full amount of Barnes's lien was valid, that the lien had priority over Flagstar's mortgage, and that the lien attached to Star Heaven's interest in the property as held by Findling. The court subsequently awarded Barnes attorney fees under the CLA. Flagstar appealed by leave granted.

The Court of Appeals *held*:

1. Flagstar's discharge of its mortgage as a part of the judicially approved sale of the property in the other action that Findling brought did not render this appeal moot or otherwise deprive Flagstar of standing to challenge the trial court's orders. An issue becomes moot when an event occurs that renders it impossible for the reviewing court to grant relief. Part of the proceeds of the sale were placed in escrow pending resolution of the priority dispute presented in this action, and whether Barnes or Flagstar was entitled to those funds depended solely on whether Barnes's construction lien or Flagstar's mortgage had priority.

2. Barnes properly filed its claims of lien using the metes and bounds property descriptions set forth in Star Heaven's notice of commencement filed under MCL 570.1108. MCL 570.1107(1) and MCL 570.1111(2) required that Barnes's claims of lien refer to the legal description set forth in the notice of commencement.

3. The trial court did not err when it found that Barnes's claims of lien were valid and had priority over Flagstar's interest. Pursuant to MCL 570.1119(3), a construction lien that arises under the CLA takes effect upon the first actual physical improvement to the property and has priority over all interests recorded after the first actual physical improvement. A lien relates back to the first actual physical improvement, regardless of when or by whom the particular work was done or the materials were furnished. While MCL 570.1126 of the CLA and MCL 559.232 of the Condominium Act provide that a construction lien for work performed on a condominium unit or an improvement furnished to a condominium unit attaches only to the condominium unit on which the work was performed or for which the improvement was furnished, when Barnes performed its first actual physical improvement to the property Star Heaven had yet to record the master deed designating the project as a condominium project and

identifying condominium unit numbers. Consequently, at the time the lien arose, Barnes was providing material and labor to a construction project as defined by the metes and bounds description set forth in the notice of commencement, not to a condominium unit, and was not required to file separate liens on each condominium unit.

4. Barnes's May 2, 2006, sworn statement substantially complied with the requirements of MCL 570.1110(4). The CLA gives owners information by requiring general contractors to make sworn statements itemizing their bills. A sworn statement notifies the owner of each subcontractor, supplier, and laborer with whom the general contractor contracted. Thus, the owner can rely on a sworn statement as a comprehensive list of potential lien claimants. The purpose of a sworn statement is to enable the owner to retain out of any money due or to become due to the contractor an amount sufficient to pay the subcontractors, suppliers, and laborers. A sworn statement must be in substantially the form set forth in the statute and must list (1) the name of each subcontractor, supplier, and laborer with whom the general contractor contracted, (2) the type of improvement furnished by each, (3) the total contract price, (4) the amount already paid to each, and (5) the amount currently owing to each. It must also be subscribed and sworn to before a notary public. Barnes's sworn statement represented that the property was free from claims of construction liens, but did not state that it was free from the possibility of construction liens as required by the statute. It nonetheless substantially complied with the statute because there was no dispute that it advised the property owner of outstanding amounts owed to contractors, subcontractors, or laborers who might have a lien on property as of the date of the statement, thus permitting the owner to retain from payments to the general contractor any money owed to subcontractors or laborers.

5. The trial court did not err by concluding that Barnes's claims of lien were timely filed and covered the entire project and not just each condominium unit that received labor and material within 90 days of the filing of the claims of lien. MCL 570.1111(1) states that a construction lien under the CLA ceases to exist unless a claim of lien is recorded within 90 days after the lien claimant's last furnishing of labor or material for the improvement pursuant to the lien claimant's contract. Thus, the time within which a claim of lien must be filed is determined by reference to the contract under which the labor or material was provided, that is, the contract necessarily defines the scope of the improvement for which the lien exists. MCL 570.1103(4) does not require a written

contract. The entire project was the subject of the contract, and it was this property that was listed in the notice of commencement.

6. The trial court did not err by permitting Barnes to satisfy its lien out of the proceeds of the sale of Star Heaven's remaining interest in the property rather than reducing the amount of the lien for work and materials provided to condominium units that were subsequently sold. Barnes's lien attached to the entire interest of Star Heaven in the property described in the notice of commencement because Star Heaven exposed the entire project to the possibility of a lien for payment for work performed.

7. The trial court did not abuse its discretion by denying Flagstar's motion to amend, vacate, or modify the prior order that granted Barnes's motion for partial summary disposition with regard to the priority of its lien. Flagstar asserted that the trial court's order was premature because discovery remained open and, further, that relief from that order was warranted under MCL 2.612(C)(1)(f). While summary disposition can be premature when discovery is ongoing, the mere fact that the discovery period remains open does not automatically mean that a trial court's decision to grant summary disposition was untimely or otherwise inappropriate. The question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position, which Flagstar failed to establish. There are three requirements for relief to be granted under MCR 2.612(C)(1)(f): the reason for setting aside the judgment must not fall under subrules (a) through (e), setting aside the judgment must not detrimentally affect the substantial rights of the opposing party, and extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice. Generally, relief is granted under subrule (f) only when the judgment was obtained by the improper conduct of the party in whose favor it was rendered. Flagstar failed to show any justification to set aside the trial court's order under MCR 2.116(C)(1)(f).

8. The trial court did not err by awarding Barnes reasonable attorney fees. MCL 570.1118(2) allows the court to award reasonable attorney fees to a lien claimant who is the prevailing party. The trial court correctly determined that Barnes was the prevailing lien claimant, and no more was required to permit the award. The trial court nonetheless considered the complexity of the case, the validity of Flagstar's position, the amount and purpose of the fees charged, and the results obtained. It determined that Barnes was not entitled to any fees for prosecuting the action to enforce its lien up to and through the granting of partial summary disposition on the priority of its lien because it had been reasonable for

Flagstar to contest the validity and priority of that lien and ask the court for time to find the subordination agreement. It concluded, however, that Flagstar's continued litigation of the issue of the priority of Barnes's lien in the absence of any subordination agreement elevating the Flagstar mortgage over the lien became unreasonable and warranted an award of attorney fees, particularly when the subsequent motion raised no issue that could not have been raised in the original response opposing summary disposition.

9. The trial court did err, however, by combining the awarded attorney fees with the amount of the construction lien. MCL 570.1107(1) states that a construction lien may not exceed the amount of the lien claimant's contract less payments made on the contract. Thus, the statute requires that the amount of any construction lien not exceed the amount the property owner owes on the contract with the claimant. Adding attorney fees to the unpaid amount of the contract would, as a matter of mathematical certainty, result in a total lien amount higher than allowed by law. Thus, because the statute expressly limits the amount of the lien to the amount owed for the work performed, an award of attorney fees may not be added to the amount of a construction lien, but must instead be awarded by a judgment separate from the lien itself. Moreover, it would be improper to award attorney fees for work that was not related to Flagstar. Remanding the case was necessary for the trial court to remove the award of attorney fees to Barnes from the construction lien and enter a separate judgment awarding attorney fees to Barnes against Flagstar that were incurred as a result of work attributable to the actions Flagstar took more than 30 days after the grant of partial summary disposition, the time given for Flagstar to locate the subordination agreement.

Affirmed in part, reversed in part, and remanded.

1. LIENS — CONSTRUCTION LIENS — CLAIMS OF LIEN — CONDOMINIUMS.

A construction lien that arises under the Construction Lien Act takes effect upon the first actual physical improvement to the property and has priority over all interests recorded after the first actual physical improvement; a lien relates back to the first actual physical improvement, regardless of when or by whom the particular work was done or the materials were furnished; the Construction Lien Act and the Condominium Act provide that a construction lien for work performed on a condominium unit or an improvement furnished to a condominium unit attaches only to the condominium unit on which the work was performed or for

which the improvement was furnished; if a contractor performs its first actual physical improvement on a construction project described by a metes and bounds description in the notice of commencement and the owner subsequently designates it as a condominium project and identifies individual condominium unit numbers, then at the time the lien arose the contractor was providing material and labor to the construction project defined by the metes and bounds description, not to a condominium unit, and the contractor is not subsequently required to file separate liens on each condominium unit (MCL 559.232, 570.1107[1], 570.1108, 570.1111[2], 570.1119[3], 570.1126).

2. JUDGMENTS — RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING — GROUNDS — OTHER REASONS FOR GRANTING RELIEF.

There are three requirements for relief from a final judgment, order, or proceeding under MCR 2.612(C)(1)(f), which allows relief for any reason, other than the grounds specified in subrules (a) through (e), justifying it: the reason for setting aside the judgment must not fall under subrules (a) through (e), the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice; generally, relief is granted under subrule (f) only when the judgment was obtained by the improper conduct of the party in whose favor it was rendered.

3. LIENS — CONSTRUCTION LIENS — ATTORNEY FEES — SEPARATE JUDGMENTS.

A court may award reasonable attorney fees to a lien claimant under the Construction Lien Act who is the prevailing party; the award of attorney fees may not be added to the amount of a construction lien, but must instead be awarded by a judgment separate from the lien itself (MCL 570.1107[1], 570.1118[2]).

*Hilger Hammond* (by *Aileen M. Leipprandt*) for C. D. Barnes Associates, Inc.

*Plunkett Cooney* (by *Robert G. Kamenec* and *Kurt E. Riedel*) for Flagstar Bank, FSB.

Before: WILDER, P.J., and O'CONNELL and K. F. KELLY, JJ.

WILDER, P.J. Defendant Flagstar Bank, FSB, appeals by leave granted an August 27, 2011, judgment that established that the construction lien of C. D. Barnes Associates, Inc., was valid for its full amount and had priority over Flagstar's mortgage interest. We affirm the construction lien judgment in favor of Barnes, affirm in part and reverse in part the award of attorney fees to Barnes, and remand this case.

## I. BASIC FACTS

This action arises out of a failed construction project undertaken by defendant Star Heaven, L.L.C., for which Flagstar provided mortgage financing and Barnes served as the general contractor.

The pertinent facts are largely undisputed. In February 2005, Star Heaven purchased a partially completed apartment project in Grand Haven. At the time of acquisition, the property consisted of 19 buildings, each containing, or planned to contain, 10 apartment units of varying sizes, along with a pool and a clubhouse, all in different stages of completion.

After Star Heaven acquired the site, it began to market the project as a "high-end condominium project" and eventually changed the name to "Grand Haven Club." In July 2005, Star Heaven hired Barnes to finish construction of the 19 buildings on the site and perform upgrades to some of the existing units and structures consistent with the new vision for the project. Barnes submitted a fixed-price contract to Star Heaven for the work to be performed, but because of uncertainty about the configuration of the units to be constructed as the project progressed, Barnes and Star Heaven instead entered into a time and materials agreement under which Barnes was to submit monthly invoices with supporting documentation to Star Heaven

for work performed at the site and Star Heaven was to pay each application for payment within 30 days of its receipt.

Barnes performed its first physical improvement to the property for Star Heaven on or about August 10, 2005. On October 4, 2005, Star Heaven filed a notice of commencement as described by MCL 570.1108, which is § 108 of the Construction Lien Act, MCL 570.1101 *et seq*.

On May 2, 2006, at Star Heaven's request, Barnes executed a sworn statement that represented that, as of that date, the subject property was "free from claims of construction liens." On May 16, 2006, Star Heaven recorded the master deed for the new condominium project. Shortly thereafter, Flagstar's loans to Star Heaven closed. Flagstar recorded its mortgage on May 23, 2006.

In May and October 2007, Star Heaven filed amended master deeds for the project, which changed the name of the condominium to "Grand Haven Club," amended the total acreage included in the property, redesignated the property into Units 1 to 40 and added Units 41 to 60 to the project.

During the course of the project, Barnes submitted 27 applications for payment to Star Heaven, which totaled approximately $3.11 million. Star Heaven paid the first 20 invoices, leaving 7 invoices totaling $360,909.11 unpaid. Before ceasing work for nonpayment, Barnes completely enclosed all 19 buildings, with two of the buildings achieving "occupancy" status, and another 11 or 12 of the buildings being completed to "white box[]" condition, such that each unit in each building was complete with all mechanical, electrical, and plumbing and was "roughed-in" with drywall. Star Heaven never expressed any concerns with the work

that was performed at the site; the explanation for late or slow payments was always an inability to pay.

Barnes last provided labor and materials to the site on March 5, 2008. On May 8, 2008, Barnes recorded nine separate claims of lien, in the amount of $360,909.11. Six of these claims of lien referred to particular individual unit numbers within the project. The three remaining claims were filed against the overall project. Each of the three liens filed against the project referred to the last day on which Barnes provided any work to the "overall project," and each used a metes and bounds description encompassing the entire property set forth in the 2005 notice of commencement; they did not refer to the dates on which labor or materials were provided to any individual condominium unit within the project.

On December 31, 2008, Star Heaven assigned all of its interests in the property to David Findling, for the purpose of liquidating the assets and distributing the proceeds to creditors according to applicable statutes.

On May 8, 2009, Barnes filed the instant complaint, seeking to foreclose on its claims of lien under the Construction Lien Act and alleging claims of breach of contract and unjust enrichment against Star Heaven and Findling. Flagstar contested the priority of Barnes's construction lien over its mortgage.

On December 24, 2009, a default was entered against Star Heaven. Thereafter, on December 28, 2009, Barnes moved for partial summary disposition on the issue of the priority of its lien over the Flagstar mortgage. Barnes argued that because there was no issue of material fact that Barnes's first day of actual physical improvement to the property predated the recording of Flagstar's mortgage, its liens had priority over the Flagstar mortgage. Barnes also asserted in support of

its motion that, in response to discovery requests, Flagstar disclosed no facts and produced no documents contesting the priority of the construction lien.

Flagstar argued that summary disposition was premature because discovery was not set to close until April 23, 2010, and additional discovery stood a fair chance of uncovering evidence to challenge the priority of Barnes's lien over the mortgage. Flagstar explained that its loan officer who oversaw the closing of the loan between Flagstar and Star Heaven was no longer with the company and consequently was not available to provide the details of the circumstances surrounding the closing of the loan. Flagstar further stated that the documents supporting the closing of the loan had moved several times over the 3½ years since the loan's closing, "which has made securing documentation to support that obligation difficult." Flagstar assured the trial court that it would continue to work to locate additional information.

On January 18, 2010, the trial court held a hearing on Barnes's motion for summary disposition, during which the parties reiterated the positions set forth in their briefs. Barnes asserted the priority of its lien on the basis of the facts before the trial court, and it argued that under the circumstances, and considering the length of time it took to get all parties properly served, Flagstar had more than sufficient time to conduct discovery. Flagstar acknowledged that the evidence submitted suggested that Barnes's construction lien could have priority, but it also asserted that this view was the result of an incomplete picture because "it is reasonable to believe that additional documentation exists that supports Flagstar's position that a subordination agreement may have been executed at the time of the closing of this loan." Counsel for Flagstar admit-

ted that he had not been able to "track . . . down" the loan officer who closed the loan or locate what he believed to be the complete documentation relating to the closing of the loan. Counsel explained that there were "two factors that suggest that [a subordination] agreement may exist":

> First of all, it's an eight-million-dollar construction loan. This loan would have been from the beginning very well documented. There would have been a lot of safeguards in place to ensure that any lien claimants would have subordinated their rights prior to the closing of the loan and especially in light of the Notice of Commencement which had been recorded months prior. We have not found yet, and we'll admit that to the Court, a subordination agreement. It is our belief, however, that it would be reasonable in this circumstance to think that such an agreement exists.
>
> The second factor that suggests that such an agreement exists is the title work. . . . The title commitment we received from the title company had as a requirement a release of all potential liens from potential lien claimants who may have done work prior to the closing of the loan. That requirement was in place on May 10th of 2006. Two weeks later, when that loan closed, that requirement was, was removed by the title company and there is no exception to that requirement in the title commitment. This suggests that something was provided to the title company which satisfied their requirement of a document that would have subordinated or released the potential lien claims that were known to be out there at that time.

Flagstar asked the court to deny Barnes's motion and allow it until the end of discovery (which was approximately three months away) "to just get to the bottom of what happened" to see if there was a subordination agreement or, alternatively, take the motion under advisement and afford it some defined period, such as

six to eight weeks, to continue its efforts to unearth evidence of such an agreement.

At the close of the hearing, the trial court ruled from the bench as follows:

> [Flagstar talks] about the discovery period, but, actually, the discovery is so that the parties can find out from each other what they have, and [Flagstar is] trying to delay discovery so [it] can find out what [it has itself] and not from somebody else.
>
> I'm going to grant [Barnes's] motion, but if [Flagstar] find[s] a subordination agreement or what [it] think[s] is a copy of the subordination agreement, [it has] 30 days in which to file a motion to set aside this order, until February 18th [2010].

The trial court entered an order effectuating this ruling on February 9, 2010.

While the instant action was pending, a separate action was also pending in the Ottawa Circuit Court before a different trial judge, Judge Edward Post. This other action was brought by Findling to liquidate the property for the benefit of Star Heaven's creditors. As the parties explained to the trial court in the instant action, the sale of the property was proceeding as part of that separate action and that sale was expected to close in March 2009. The parties and the trial court agreed, therefore, that the instant action was solely for the purpose of determining the priority and amount of valid liens to be asserted against the proceeds of that sale.

Flagstar later moved to modify, amend, or vacate the order granting Barnes's motion for summary disposition. Flagstar filed its motion under MCR 2.612 (as a motion for relief from judgment), under MCR 2.613 (as a request to "correct" the court's prior order), and under MCR 2.116(C)(10) and (I)(2) (as a motion for summary disposition of Barnes's claims). Flagstar as-

serted that the May 2, 2006, sworn statement, in which Barnes represented that the property was free of construction liens as of that date, barred Barnes from asserting that its lien had priority over Flagstar's mortgage. Flagstar also claimed that the sworn statement was defective because, rather than state that the property was free from "the possibility of construction liens" as required by MCL 570.1110(4) of the Construction Lien Act, the sworn statement provided only that the property was "free from construction liens." Flagstar further asserted that Barnes's claims of lien were invalid because they referred to the metes and bounds description for the entire property and not to the individual condominium units to which materials or labor or both were supplied. Last, Flagstar maintained that the liens on the entire property were invalid because Barnes had provided work and materials only to one particular condominium unit within 90 days of recording its claims of lien.

Barnes opposed Flagstar's motion, asserting that Flagstar's motion was "essentially a motion for reconsideration" and that it did not present any new evidence for, or any legal basis requiring, reversal of the trial court's prior decision. Barnes argued that its May 2, 2006, sworn statement did not alter the priority of its lien over the mortgage because the sworn statement was not a lien waiver and did not extinguish lien rights under the Construction Lien Act. Barnes averred that if Flagstar had wanted a lien waiver, it could have requested one pursuant to the Construction Lien Act. Additionally, Barnes asserted that it was permitted to use the metes and bounds legal description set forth in the notice of commencement in its claims of lien, and it denied that Barnes's lien was rendered invalid because it did not refer to individual condominiums units within the project. Finally, Barnes argued that its claims of lien

were timely filed because they were filed well within 90 days of the last furnishing of labor and materials for improvements to the project as contracted for by Star Heaven.

While Flagstar's motion was pending, Barnes moved for entry of a foreclosure judgment, asking the trial court to enter a judgment in its favor against the property in the amount of $360,909.11, together with its costs, attorney fees, and other relief allowed under the Construction Lien Act.

After conducting a hearing on June 11, 2010, the trial court issued an opinion and order granting in part and denying in part Barnes's motion for entry of judgment and denying Flagstar's motion to modify, amend, or vacate its prior order granting partial summary disposition with respect to priority. The trial court noted that the sworn statement did not constitute newly discovered evidence as required by MCL 2.612(C)(1)(b), making Flagstar's reliance on this court rule misplaced. Additionally, the trial court held that MCR 2.613 likewise was inapplicable "because Flagstar did not provide the sworn statement as evidence or present the arguments that it now submits in its first brief in opposition to [Barnes's] motion for partial summary disposition." As a result, the trial court concluded that Flagstar's motion was in essence a motion for reconsideration under MCR 2.119(F). In this context, the trial court proceeded to consider and reject each of Flagstar's challenges to the validity of Barnes's lien.

First, regarding the effect of the May 2, 2006, sworn statement, the trial court reasoned that a sworn statement is not a waiver of construction liens and that

> if Flagstar wanted a waiver of all current and future claims, it could have asked for one. In fact, in light of Flagstar's original request for more "discovery" to find a subordina-

> tion agreement in its files, it appears that Flagstar would not ordinarily rely on a sworn statement to assure it first priority.

The trial court also determined that the sworn statement substantially complied with the Construction Lien Act, despite the fact that it failed to exactly follow the statutory language that "the property is free from . . . the possibility of construction liens." MCL 570.1110(4).

Next, the trial court rejected the assertion that Barnes's lien was invalid because it referred to the metes and bounds description of the property rather than the unit descriptions as allegedly required by the Condominium Act, MCL 559.101 *et seq*. The trial court reasoned that MCL 570.1107 and MCL 570.1108 of the Construction Lien Act allowed for the use of the metes and bounds description and that the Condominium Act did not alter this.

The trial court likewise rejected Flagstar's assertion that Barnes's lien was not timely filed or that Barnes was required to file individual liens for each condominium unit to which work was furnished:

> Here, Star Heaven did not update its notice of commencement when it converted the project to condominiums and filed its master deed. Instead, it offered the entire property as security for the contractors' work. Thus, neither law nor equity compels this Court to reform the scope of the lien to attach only to the individual units. Accordingly, it is proper to attach the entire amount of [Barnes's] lien to the Assignee's interest with priority over Flagstar's interest.
>
> With respect to the 90-day limitations period, . . . it is undisputed that [Barnes] provided an "improvement" to the Property. There is no genuine issue of material fact that [Barnes] did so pursuant to a contract, of whatever nature. There is no dispute that [Barnes] filed its claim of lien

> within 90 days of furnishing some labor or material to some part of the property. And as discussed above, the claim of lien properly referenced the metes and bounds description. Thus, if this case did not involve condominium units, based on the plain language of the statute, there would be no question that [Barnes] timely filed its construction lien. And because the lien attaches to the entire property in the notice of commencement, it does not change in this case. [Citations omitted.]

Having concluded that the full amount of Barnes's lien was valid, that the lien had priority over Flagstar's mortgage, and that the lien attached to Star Heaven's interest in the property (as then held by Findling as assignee), the trial court nevertheless determined that, because of the action pending before Judge Post, it lacked the authority to grant a judgment of foreclosure. Therefore, the trial court denied Barnes's motion for entry of a judgment of foreclosure.

Following entry of the trial court's order, Barnes moved for attorney fees under § 118(2) of the Construction Lien Act, MCL 570.1118(2), and sanctions under MCR 2.114 and MCR 2.625. Barnes stated that it had incurred attorney fees through July 29, 2010, in an amount exceeding $56,000. Additionally, Barnes observed that Flagstar had failed to disclose during discovery that it discharged its mortgage on March 23, 2010, depriving it of any interest in the property thereafter and that it had continued to argue that its now-discharged mortgage had priority over Barnes's lien. Barnes asserted that this position was frivolous and devoid of legal merit, thereby entitling it to sanctions.

Flagstar opposed Barnes's request for attorney fees and sanctions on the basis that an award of attorney fees was discretionary, and not mandatory, under the Construction Lien Act and that it "had a right to defend

this $360,000.00 lien claim recorded two years after the closing of the Flagstar mortgage. It had a right to receive and review [Barnes's] 'proof' of work done, the amounts claimed, and take [Barnes's] deposition." Flagstar also noted the novelty of the issues, which it described as "on the cutting edge of construction lien law right now." Because its defense of the action was justified, Flagstar urged the court to decline to award Barnes attorney fees. Flagstar further requested that if the trial court determined that an award of fees was appropriate, it require Barnes to produce itemized billings of the work performed in order to permit the court to properly evaluate the reasonableness of the fees claimed.

With regard to the request for sanctions, Flagstar explained that it was required to discharge its mortgage so that the property could be sold in the case brought by Findling and that its right to its appropriate share of the sale proceeds because of its mortgage was preserved by Judge Post in that action. Further, Flagstar asserted that Barnes never requested information through discovery that would have included the only very recent discharge of the mortgage.

After conducting a hearing on Barnes's motion for fees and sanctions, the trial court directed Barnes to provide more detailed invoices related to its requested attorney fees and costs. Barnes did so, Flagstar timely filed objections, and Barnes responded to those objections. On August 26, 2010, the trial court issued its opinion granting Barnes $32,460 in attorney fees but denying sanctions. The trial court found that Flagstar had unreasonably disputed the priority of Barnes's lien after Flagstar failed to find a subordination agreement by the February 18, 2010, deadline imposed by the court. The trial court also concluded that Flagstar's

subsequent motion to modify, amend, or vacate the court's order granting Barnes's motion for summary disposition "raised no issue that could not have been raised in the original response in opposition to summary disposition." Therefore, the trial court awarded Barnes reasonable attorney fees incurred after February 18, 2010, totaling $32,460. However, the trial court rejected Barnes's request for sanctions, finding that "[e]ven though Flagstar discharged its mortgage, it did not discharge the underlying obligation. It did not lose standing to assert [that] its claim had priority over [Barnes's] claim."

On August 27, 2010, the trial court entered judgment in favor of Barnes, declaring that Barnes's construction lien had priority over Star Heaven's mortgage to Flagstar and that it was "valid for the full amount claimed of $360,909.11 and attorney fees in the amount of $32,460." Thereafter, proceedings were stayed pending resolution of this appeal to this Court.

## II. MOOTNESS

As a threshold matter, we note that Barnes argues that the instant appeal is moot because Flagstar discharged its mortgage during the pendency of these proceedings. Barnes correctly observes that an issue becomes moot when an event occurs that renders it impossible for the reviewing court to grant relief. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 472; 761 NW2d 846 (2008). However, contrary to Barnes's assertions, because of the circumstances presented here, Flagstar's claim to the proceeds of the sale was not rendered moot by the discharge of its mortgage as a part of the judicially approved sale of the property in the action brought by Findling before Judge Post. As Barnes indicates, under Judge Post's supervision, Fin-

dling sold the property for $4.5 million. As a condition of that sale, Flagstar executed a discharge of its mortgage so that Findling could convey clear title to the purchaser, and $375,000 from the sale was placed in escrow pending resolution of the priority dispute presented in the instant action. Whether Barnes or Flagstar is entitled to receipt of those funds is solely dependent on whether Barnes's construction lien has priority or whether Flagstar's mortgage has priority. Accordingly, under the circumstances here presented, Flagstar's discharge of its mortgage did not render the instant appeal moot or otherwise deprive Flagstar of standing to challenge the trial court's orders.

## III. VALIDITY OF CLAIMS OF LIEN

### A

This Court reviews a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When reviewing a decision on a motion brought under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court must consider all the substantively admissible evidence submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(6); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue on which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

This Court also reviews issues of statutory interpretation de novo. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). The primary goal of judicial inter-

pretation of statutes is to discern the intent of the Legislature by examining the plain language of the statute. *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). The starting point in every case involving construction of a statute is the language itself. *House Speaker v State Admin Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993). "Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence." *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). If the statutory language is clear and unambiguous, the court must apply the statute as written, and judicial construction is neither necessary nor permitted. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999); *Gebhardt v O'Rourke*, 444 Mich 535, 541-542; 510 NW2d 900 (1994). The court must consider the object of the statute in light of the harm it is designed to remedy and apply a reasonable construction that best accomplishes the purposes of the statute. *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994). "Also, it is a settled rule of statutory construction that where a statute contains a specific statutory provision and a related, but more general, provision, the specific one controls." *In re Haley*, 476 Mich 180, 198; 720 NW2d 246 (2006), citing *Gebhardt*, 444 Mich at 542-543.

B

Flagstar first argues that Barnes's claims of lien are ineffective because they described the subject property by metes and bounds instead of as individual condominium units. We disagree.

Barnes relies on §§ 107 and 108 of the Construction Lien Act, MCL 570.1107 and MCL 570.1108, to assert

that it properly filed its claims of lien using the metes and bounds property descriptions set forth in the notice of commencement filed by Star Heaven.

The Construction Lien Act "control[s] all rights to a construction lien arising from any project" for which a contract was first entered into after certain dates in 1982. MCL 570.1301(1) and (3). Section 107 of the Construction Lien Act provides in relevant part:

> (1) Each contractor, subcontractor, supplier, or laborer who provides an improvement to real property has a construction lien upon the interest of the owner or lessee who contracted for the improvement to the real property, *as described in the notice of commencement* given under [MCL 570.1108 or MCL 570.1108a], the interest of an owner who has subordinated his or her interest to the mortgage for the improvement of the real property, and the interest of an owner who has required the improvement. A construction lien acquired pursuant to this act shall not exceed the amount of the lien claimant's contract less payments made on the contract.
>
> (2) A construction lien under this act *attaches to the entire interest of the owner or lessee who contracted for the improvement*, including any subsequently acquired legal or equitable interest. [MCL 570.1107 (emphasis added).]

And relating to the notice of commencement, § 108 of the Construction Lien Act provides in relevant part:

> (1) Before the commencement of any actual physical improvements to real property, the owner or lessee contracting for the improvements shall record in the office of the register of deeds for each county in which the real property to be improved is located a notice of commencement, in the form set forth in this section. *If all improvements relate to a single project only 1 notice of commencement need be recorded*. A subsequent notice of commencement need not be recorded for an improvement to any real property which currently has a notice of commencement recorded in the office of the register of

> deeds if that recorded notice of commencement contains the same information as the subsequent notice of commencement.
>
> (2) The notice of commencement shall contain the following information:
>
> (a) *The legal description of the real property on which the improvement is to be made*. . . .
>
> * * *
>
> (f) The following statement:
>
> "To lien claimants and subsequent purchasers:
>
> Take notice that work is about to commence on an improvement to the real property described in this instrument. A person having a construction lien may preserve the lien by providing a notice of furnishing to the above named designee and the general contractor, if any, and by timely recording a claim of lien, in accordance with law.
>
> A person having a construction lien arising by virtue of work performed on this improvement should refer to the name of the owner or lessee and the legal description *appearing in this notice.* A person subsequently acquiring an interest in the land described is not required to be named in a claim of lien.
>
> A copy of this notice with an attached form for notice of furnishing may be obtained upon making a written request by certified mail to the above named owner or lessee; the designee; or the person with whom you have contracted." [MCL 570.1108 (emphasis added).]

Further, § 111 of the Construction Lien Act describes the form of a valid claim of lien. In this section, the property is to be described by using the "legal description of real property from notice of commencement." MCL 570.1111(2).

Flagstar, on the other hand, argues that despite those provisions, § 126 of the Construction Lien Act, MCL 570.1126, and §§ 61 and 132 of the Condominium Act,

MCL 559.161 and MCL 559.232, required Barnes to file separate liens against each individual condominium unit for work performed on that unit and precluded Barnes from filing a lien against the entire project.

Sections 126 of the Construction Lien Act and 132 of the Condominium Act both provide that a construction lien for an improvement furnished to a condominium unit attaches only to the condominium unit to which the improvement was furnished. MCL 570.1126(1); MCL 559.232.

Additionally, § 61 of the Condominium Act provides:

> Upon the establishment of a condominium project *each condominium unit*, together with and inseparable from its appurtenant share of the common elements, *shall be a sole property subject to* ownership, mortgaging, taxation, possession, sale, and *all types of juridical acts*, inter vivos or causa mortis *independent of the other condominium units*. [MCL 559.161 (emphasis added).]

As defined by the condominium act, the "condominium unit" is "that portion of the condominium project designed and intended for separate ownership and use, as described in the master deed." MCL 559.104(3).

As this Court recently reaffirmed in *Stock Bldg Supply, LLC v Parsley Homes of Mazuchet Harbor, LLC*, 291 Mich App 403, 406-407; 804 NW2d 898 (2011):

> The Construction Lien Act is a remedial statute that sets forth a comprehensive scheme aimed at protecting "the rights of lien claimants to payment for expenses and . . . the rights of property owners from paying twice for these expenses." It is to be liberally construed "to secure the beneficial results, intents, and purposes" of the act. MCL 570.1302(1). [Citations omitted.]

The Legislature has specified that because the Construction Lien Act is a remedial statute, "[s]ubstantial compliance with the provisions of this act shall be

sufficient for the validity of the construction liens provided for in this act." MCL 570.1302(1); see also *Big L Corp v Courtland Constr Co*, 482 Mich 1090 (2008).

The unambiguous, plain language of §§ 107(1) and 111(2) of the Construction Lien Act required that Barnes's claims of lien refer to the legal description set forth in the notice of commencement filed by Star Heaven. It is undisputed that the notice of commencement used a metes and bounds description for the entire property. Thus, the form of Barnes's liens, using the metes and bounds descriptions, substantially complied with the Construction Lien Act in this regard.

Having determined that the requirements for a valid lien were met under the Construction Lien Act, the question then becomes, upon the filing of the master deed *after* the notice of commencement was filed, which redefined the project as a condominium project, whether Barnes was required by § 132 of the Condominium Act to file separate liens against each individual condominium unit within the project. As discussed below, we conclude that the statute does not require such individual filings.

At issue is the interplay between the Construction Lien Act and the Condominium Act. Section 126 of the Construction Lien Act, MCL 570.1126, and § 132 of the Condominium Act, MCL 559.232, provide that a construction lien for work performed on a condominium unit or for an improvement furnished to a condominium unit attaches only to the condominium unit on which the work was performed or for which the improvement was furnished.

Generally, "pursuant to MCL 570.1119(3), a construction lien that arises under the [Construction Lien Act] takes effect upon the first actual physical improvement to the property and has priority over all interests

recorded after the first actual physical improvement," and this Court has "further held that liens relate back to the first actual physical improvement regardless of the time when, or the person by whom, the particular work was done or the materials furnished for which a lien is claimed." *Jeddo Drywall, Inc v Cambridge Investment Group, Inc*, 293 Mich App 446, 452-453; 810 NW2d 633 (2011) (citations and quotation marks omitted); see also *M D Marinich, Inc v Mich Nat'l Bank*, 193 Mich App 447, 454; 484 NW2d 738 (1992).

At the time that Barnes performed its first actual physical improvement to the property, under the notice of commencement, Star Heaven had yet to record the master deed designating the project as a condominium project or identifying condominium unit numbers. Consequently, from the outset, Barnes was providing material and labor to a construction project as defined by the metes and bounds description set forth in the notice of commencement; Barnes was not providing labor or material to a "condominium unit" as contemplated by § 126 of the Construction Lien Act and § 132 of the Condominium Act. Considering the importance placed on the date of first actual improvement in determining the priority of construction liens, MCL 570.1119(3), we conclude that at the time Barnes's lien arose under the Construction Lien Act, the work performed was not "performed upon a condominium unit," so as to invoke the requirement that Barnes file separate liens on each condominium unit under § 132 of the Condominium Act. As a result, we hold that Barnes's claims of lien were valid and that the lien was entitled to priority over Flagstar's mortgage interest. Importantly, Star Heaven did not record a master deed for the condominium project until May 2006, *after* Barnes began working on the project in August 2005.

Flagstar offers this Court no authority requiring that, under these circumstances, Barnes was required by virtue of the subsequently filed master deed to file separate liens against individual condominium units. Barnes had potential liens arising from the date it began the project, and the Construction Lien Act undisputedly controlled at that time. Our holding is consistent with the purpose of the Construction Lien Act, which "is designed to protect the rights of lien claimants to payment for expenses and to protect the rights of property owners from paying twice for these expenses." *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 373-374; 652 NW2d 474 (2002). Consequently, the trial court did not err when it similarly found that Barnes's claims of lien were valid and had priority over Flagstar's interest.

We further observe that to hold otherwise would require a contractor who begins work on a non-condominium project, under a notice of commencement setting forth a metes and bounds description of the property to be improved, to be hypervigilant about whether at any point during the course of construction the property owner converts the project to a condominium project and then, if the owner does so, to file any liens for work performed before the conversion in accordance with the notice of commencement as required by § 108 of the Construction Lien Act and file separate liens for work performed after the conversion with respect to each condominium unit under § 126 of the Construction Lien Act and § 132 of the Condominium Act. This result runs counter to both the principle that a construction lien arises under the Construction Lien Act as of the date of first actual physical improvement to the property and the remedial purpose of the Construction Lien Act itself.

C

Flagstar next argues that the trial court erred when it determined that the May 2, 2006, sworn statement substantially complied with the statutory requirements. We disagree.

As this Court explained in *Big L Corp v Courtland Constr Co*, 278 Mich App 438, 441-442; 750 NW2d 628 (2008), vacated in part on other grounds 482 Mich 1090 (2008):

> The [Construction Lien Act] . . . provides owners with information by requiring general contractors to make sworn statements itemizing their bills. A sworn statement notifies the owner of each subcontractor, supplier, and laborer with whom the general contractor contracted. Thus, the owner can rely on a sworn statement as a comprehensive list of potential lien claimants. The purpose of a sworn statement is to enable the [owner] to retain out of any money due or to become due to the contractor an amount sufficient to pay the subcontractors, suppliers and laborers. [Citations and quotation marks omitted.]

In addition to the general provision of the Construction Lien Act, MCL 570.1302(1), only requiring substantial compliance with the act's provisions, MCL 570.1110(4) explicitly requires that sworn statements be in "substantially" the form set forth in the statute:

> Pursuant to the statute's exemplar form, the sworn statement must list: (1) the name of each subcontractor, supplier, and laborer with whom the general contractor contracted; (2) the type of improvement furnished by each; (3) the total contract price; (4) the amount already paid to each; and (5) the amount currently owing to each. It must also be subscribed and sworn to before a notary public. [*Big L*, 278 Mich App at 442, citing MCL 570.1110(4).]

The exemplar form advises the owner that the information provided is

> a statement of each subcontractor and supplier, and laborer for whom payment of wages or fringe benefits and withholdings is due but unpaid, with whom the (contractor) (subcontractor) has (contracted) (subcontracted) for performance under the contract with the owner or lessee of the property, and the amounts due to the persons as of the date of this statement . . . . [MCL 570.1110(4).]

Additionally, the exemplar form sets forth the following attestation by the contractor or subcontractor issuing the statement:

> I make this statement as the (contractor) (subcontractor) or as . . . . . of the (contractor) (subcontractor) to represent to the owner or lessee of the property and his or her agents that the property is free from claims of construction liens, *or the possibility of construction liens*, except as specifically set forth in this statement and except for claims of construction liens by laborers that may be provided under section 109 of the construction lien act, 1980 PA 497, MCL 570.1109. [*Id*. (emphasis added).]

Flagstar argues that the May 2, 2006, sworn statement from Barnes, in which Barnes represented that the property was "free from claims of construction liens," but did not state that it was "free from the *possibility* of construction liens" did not substantially comply with the Construction Lien Act. Flagstar asserts further that "[s]ince an invalid Sworn Statement was provided here, there is no Sworn Statement," which results in Barnes's claims of lien being invalid.

Addressing Flagstar's second assertion first, § 110(9) of the Construction Lien Act provides that

> [i]f a contractor fails to provide a sworn statement to the owner or lessee before recording the contractor's claim of lien, the contractor's construction lien is not invalid. However, the contractor is not entitled to any payment, and a complaint, cross-claim, or counterclaim may not be filed to

> enforce the construction lien, until the sworn statement has been provided. [MCL 570.1110(9).]

It is not disputed that Barnes provided a sworn statement, reflecting unpaid amounts owing, in advance of instituting the instant action. Thus, even if the May 2, 2006, sworn statement was deemed to constitute a failure to provide a sworn statement, contrary to Flagstar's position, Barnes's lien remained valid and enforceable.

Moreover, we conclude that Barnes's May 2, 2006, sworn statement did substantially comply with the statute. Flagstar does not assert that the sworn statement failed to advise Star Heaven of the name of each subcontractor, supplier, and laborer with whom Barnes had contracted; the improvement furnished by each such subcontractor, supplier, or laborer; the total contract price for those improvements; or the amount paid and remaining owing to each such subcontractor, supplier, or laborer. Flagstar also takes no issue with the accuracy of Barnes's sworn statement. Instead, Flagstar asserts only that the omission of the "possibility" language from the sworn statement was material. Considering that the purpose to be served by a sworn statement is to advise the owner of outstanding amounts owed to contractors, subcontractors, or laborers who might have a lien on property *as of the date of the statement* so as to permit the property owner to retain out of payment to the general contractor any money owed to subcontractors or laborers, *Erb Lumber, Inc v Gidley*, 234 Mich App 387, 399 n 5; 594 NW2d 81 (1999), we reject Flagstar's position and conclude that the sworn statement substantially complied with the requirements of MCL 570.1110(4). See *Big L*, 278 Mich App at 443-444 (stating that an unverified sworn statement substantially complied with MCL 570.1110(4)

because the owner had notice of its substance); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 510-511; 667 NW2d 379 (2003) (stating that an unverified sworn statement substantially complied with the notice requirement of former MCL 570.1110(8) because the owner had notice of its substance).

## IV. LIMITATION OF CLAIMS OF LIEN

### A

Flagstar argues that the trial court erred by refusing to limit Barnes's claims of lien to work and material actually provided to each unit within 90 days of the filing of the claims of lien. We disagree.

As noted earlier, § 107(1) of the Construction Lien Act states that a contractor who provides an improvement[1] to real property has a construction lien on the interest of the owner who contracted for the improvement to the real property, "as described in the notice of commencement." MCL 570.1107(1). However, § 111(1) declares that "a construction lien created by this act shall cease to exist unless, within 90 days after the lien claimant's last furnishing of labor or material for the improvement, *pursuant to the lien claimant's contract*, a claim of lien is recorded . . . ." MCL 570.1111(1) (emphasis added). Further, § 111(2) of the Construction Lien Act provides that a claim of lien is to identify the

[1] Section 104 of the Construction Lien Act defines "improvement" as

> the result of labor or material provided by a contractor, subcontractor, supplier, or laborer, including, but not limited to, surveying, engineering and architectural planning, construction management, clearing, demolishing, excavating, filling, building, erecting, constructing, altering, repairing, ornamenting, landscaping, paving, leasing equipment, or installing or affixing a fixture or material, *pursuant to a contract*. [MCL 570.1104(5) (emphasis added).]

legal description of the property against which the lien is claimed, *as set forth in the notice of commencement*. MCL 570.1111(2). But § 126 of the Construction Lien Act, MCL 570.1126, and § 132 of the Condominium Act, MCL 559.232, each declare that construction liens attach only to the individual condominium unit to which improvements were made.

Examining the pertinent language of each these statutory provisions, we first observe that a claimant must file its lien no later than[2] 90 days from the last date of furnishing labor or material, *pursuant to the lien claimant's contract*. Because the time within which a claim of lien is to be filed is determined by reference to the contract under which the labor or material was provided, the contract necessarily defines the scope of the improvement for which the lien (if timely filed) exists. MCL 570.1107; MCL 570.1111(1); MCL 570.1114.

It is undisputed that there was no written contract between Barnes and Star Heaven delineating the scope of the improvement to which Barnes was contributing its labor and material. However, the Construction Lien Act does not require a written contract; it permits a contract "of whatever nature." MCL 570.1103(4).[3] All the evidence presented below indicated that Barnes was retained, on a time-and-materials basis, to serve as the

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[2] Our Supreme Court has clarified that the Construction Lien Act's allowing of substantial compliance does not apply to this requirement. Instead, the 90-day window is a certain deadline that must be met in order for a claimant to successfully maintain a construction lien. *Northern Concrete Pipe, Inc v Sinacola Companies-Midwest, Inc*, 461 Mich 316, 322-323; 603 NW2d 257 (1999).

[3] Section 103 of the Construction Lien Act defines "contract" as "a contract, of whatever nature, for the providing of improvements to real property, including any and all additions to, deletions from, and amendments to the contract." MCL 570.1103(4).

general contractor for the entire project being undertaken at the property by Star Heaven. Thus, "the improvement" to which Barnes was supplying its labor and material was in furtherance of *the entire project*. We emphasize that the circumstances of the instant case differ from instances in which the parties contract on a unit-by-unit basis. There being no dispute, however, that Barnes's claims of lien were filed within 90 days of its last provision of labor or materials to the project as contemplated in the contract, we hold that the trial court did not err by concluding that Barnes's claims of lien were timely filed and encompassed the entire project—and not just each unit that received labor and material within 90 days of the filing of the claims of lien—since the entire project was the subject of the contract and it was this property that was listed in the notice of commencement.

B

Flagstar next argues that the trial court erred by failing to reduce the amount of the lien for work and materials provided to units that were subsequently sold. We disagree.

Again, § 107(2) of the Construction Lien Act specifies that a construction lien "attaches *to the entire interest of the owner* . . . who contracted for the *improvement*, including any subsequently acquired legal or equitable interest." MCL 570.1107(2). Star Heaven contracted for the improvements—the materials and labor—that Barnes provided to the property, and Star Heaven did so as part of a single project. Plainly, then, under § 107(2) of the Construction Lien Act, Barnes's lien attached to the entire interest of Star Heaven in the property as described in the notice of commencement. And, in its notice of commencement, Star Heaven described the

property to which the improvement was being undertaken with a metes and bounds description outlining the entire project. It thus exposed the entire project to the possibility of a lien for payment for work performed.

Flagstar maintains that because of § 126 of the Construction Lien Act and § 132 of the Condominium Act, the unpaid amounts attributable to work performed on condominium units since sold by Star Heaven should be apportioned from the lien amount enforceable against the remaining Star Heaven property. However, MCL 570.1126(1)(a) addresses a construction lien "for an *improvement* furnished to a condominium unit" and provides that the lien "shall attach only to the condominium unit to which *the improvement* was furnished." (Emphasis added.) MCL 559.232(a) provides a similar limitation for "work" performed on a condominium unit. But as discussed in part IV(A) of this opinion, the scope of an "improvement" is defined by the contract. Because the contract addressed furnishing material and labor to the *entire project*, rather than individual condominium units, the complete unpaid amount of Barnes's lien attached to the entire remaining interest of Star Heaven. As a result, the trial court did not err by permitting Barnes to satisfy its lien out of the proceeds of the sale of Star Heaven's remaining interest in the property.

### V. FLAGSTAR'S MOTION TO AMEND, VACATE, OR MODIFY

Flagstar next argues that the trial court erred when it denied its motion to amend, vacate, or modify the court's prior order granting Barnes's motion for summary disposition. We disagree.

This Court reviews both a trial court's decision whether to set aside a prior order or judgment under MCR 2.612(C)(1) and a trial court's decision regarding

a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000); *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999). Accordingly, those decisions will only be reversed if they fall outside the range of principled outcomes. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008).

Flagstar asserts on appeal that the trial court's order granting Barnes partial summary disposition with regard to priority was premature because discovery remained open and, further, relief from that order was warranted under MCL 2.612(C)(1)(f).[4] Concerning Flagstar's first argument, while we agree that the granting of summary disposition can be premature when discovery is ongoing,

> the mere fact that the discovery period remains open does not automatically mean that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate. *The question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position*. [*Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009) (emphasis added).]

At the January 18, 2010, hearing on Barnes's motion for partial summary disposition, Flagstar represented to the trial court that it needed additional time to locate a subordination agreement, which it believed would have been executed in conjunction with the closing of its loan to Star Heaven. Flagstar did not identify any other discovery it believed pertinent to its defense. Despite granting Barnes's motion, the trial court afforded Flagstar an additional 30 days to locate the agreement.

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[4] MCR 2.612(C)(1)(f) permits a court to relieve a party from an order for "[a]ny other reason justifying [such] relief."

Flagstar did not, and does not, complain that this amount of time was insufficient. Flagstar does not assert that it needed additional time or that more time would have resulted in it locating additional documentation supporting its position. It merely asserts that the trial court should have waited until the close of discovery to rule on Barnes's motion. Therefore, because Flagstar has failed to establish that discovery stood a fair chance of uncovering additional facts to support its position, the trial court's decision to grant Barnes's motion for partial summary disposition was not premature.

Further, to the extent that Flagstar's argument is premised on MCR 2.116(C)(1)(f), we conclude that Flagstar has not established "[a]ny other reason justifying relief" from the trial court's order. Instead, as discussed earlier, the trial court properly determined that Barnes's claim of lien was valid and was timely filed, that the entire amount of that claim was enforceable against Star Heaven's interest in the property, and that the primacy of Barnes's lien was not affected by the May 2, 2006, sworn statement.

MCR 2.612(C)(1) provides:

> On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect.
>
> (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
>
> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
>
> (d) The judgment is void.

> (e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.
>
> (f) Any other reason justifying relief from the operation of the judgment.

As this Court explained in *Heugel*, 237 Mich App at 478-479:

> In order for relief to be granted under MCR 2.612(C)(1)(f), the following three requirements must be fulfilled: (1) the reason for setting aside the judgment must not fall under subsections a through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) *extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice*. Generally, relief is granted under subsection f only when the judgment was obtained by the improper conduct of the party in whose favor it was rendered. [Citations omitted; emphasis added.]

Assuming arguendo that the first two requirements were met, there is no extraordinary circumstance present in this case and no allegation that the trial court's order was obtained as a result of improper conduct by Barnes. Thus, Flagstar fails to show any justification to set aside the trial court's order under MCR 2.116(C)(1)(f), and the trial court did not abuse its discretion by denying Flagstar relief from the prior order under that court rule.

Finally, Flagstar asserts that there were additional questions of fact about the validity and amount of Barnes's lien for resolution by the trial court. However, Flagstar does not specifically identify any such questions. Rather, Flagstar simply asserts that the trial court failed to give appropriate effect to the May 2, 2006, sworn statement as related to the issue of priority. Moreover, as the trial court concluded, Flagstar's mo-

tion to vacate, amend, or modify the prior order of the trial court was essentially a motion for reconsideration. Flagstar's motion was premised on the existence of the sworn statement. However, Flagstar did not assert that the sworn statement constituted newly discovered evidence, and even had it done so, a trial court properly denies a motion for reconsideration when, as was the case here, the evidence offered in support of the motion could have, with reasonable diligence, been produced at the time the court made it initial ruling. *Churchman*, 240 Mich App at 233. Therefore, we hold that the trial court did not abuse its discretion by denying Flagstar's motion to amend, vacate, or modify the prior order granting Barnes's motion for partial summary disposition with regard to the priority of its lien.

## VI. ATTORNEY FEES

Flagstar last argues that the trial court erred when it awarded attorney fees under the Construction Lien Act. We disagree.

This Court reviews a trial court's decision to award attorney fees under the Construction Lien Act for an abuse of discretion. *Solution Source*, 252 Mich App at 381. Any attendant findings of fact are reviewed for clear error. *Id*. Findings are clearly erroneous when, although there is evidence to support them, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made. *Id*. at 381-382.

Section 118(2) of the Construction Lien Act, MCL 570.1118(2) provides that "[t]he court may allow reasonable attorneys' fees to a lien claimant who is the prevailing party." The word "may" denotes permissive and not mandatory action. *AFSCME v Detroit*, 267

Mich App 255, 260; 704 NW2d 712 (2005). Thus, the award of attorney fees to Barnes was discretionary with the trial court.

The trial court considered the complexity of the case, the validity of Flagstar's position, the amount and purpose of the fees charged, and the results obtained. It determined that Barnes was not entitled to any fees for prosecuting this action to enforce its lien up to, and through, the granting of its motion for partial summary disposition with regard to the first priority of its lien, noting that

> it was reasonable for Flagstar and the other defendants to contest the validity and priority of [Barnes's] lien and complete discovery in this case. It was reasonable to require that [Barnes] obtain the Court's decision on priority by filing its motion for summary disposition, and it was not unreasonable to ask this Court for a little more time to find a subrogation [sic: subordination] agreement. Accordingly, defendants had a legitimate reason to litigate the issue until after the hearing for summary disposition and the allotted time to file a motion to set aside the summary disposition order passed (until February 18, 2010).

It concluded, however, that Flagstar's continued litigation of the issue of the priority of Barnes's lien, in the absence of any subordination agreement elevating the Flagstar mortgage over the Barnes lien, became unreasonable and warranted an award of attorney fees, "particularly when the subsequent motion raised no issue that could not have been raised in the original response in opposition to summary disposition."

Flagstar does not challenge the trial court's evaluation of the complexity of the case. It instead argues that its defense of the action was justified, asserting that it "had an absolute right (even if the [trial court's] priority order was appropriate) to thereafter examine and challenge the lien based upon its invalidity and

amount." But Flagstar fails to recognize that the only requirement for a claimant to receive attorney fees under the Construction Lien Act is to be the prevailing party. *Vugterveen Sys, Inc v Olde Millpond Corp*, 454 Mich 119, 133; 560 NW2d 43 (1997), citing MCL 570.1118(2). In the present case, the trial court correctly determined that Barnes was the prevailing lien claimant; no more was required to permit the trial court to exercise its discretion to award Barnes its attorney fees under the Construction Lien Act. Therefore, the trial court did not abuse its discretion by awarding Barnes reasonable attorney fees.

The trial court did err, however, by combining the awarded attorney fees with the amount of the construction lien. The judgment stated that Barnes's construction lien had priority over Flagstar's mortgage interest and that *the lien* was "valid for the full amount claimed of $360,909.11 *and* attorney fees in the amount of $32,460." (Emphasis added.) MCL 570.1118(2), which authorizes the award of attorney fees to a lien claimant as long as it was the prevailing party, does not address whether the attorney fees should be included in or excluded from the lien claimant's entitlement under the construction lien.

MCL 570.1107(1) states that "[a] construction lien acquired pursuant to this act shall not exceed the amount of the lien claimant's contract less payments made on the contract." The word "shall" in a statute denotes mandatory action. *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 409; 716 NW2d 236 (2006). Thus, examining the plain language of the statute, as this Court is required to do, *Driver*, 490 Mich at 246-247, we conclude that MCL 570.1107(1) mandates that the amount of any construction lien not exceed the amount the property owner owes on the

contract with the claimant. Adding an amount of attorney fees to the unpaid amount of the contract would, as a matter of mathematical certainty, result in a total lien amount necessarily higher than allowed by law. Thus, because the statute expressly states that the amount of the lien is limited to the amount owed for the work performed, we hold that the award of attorney fees is not properly added to the amount of a construction lien, but must instead be awarded by way of a judgment separate from the lien itself.

Flagstar alternatively argues that if an attorney fee award is proper, any such award should be included in a judgment against "the contracting party"—that is, against Star Heaven. However, Star Heaven did not contest Barnes's lien, and Barnes did not prevail against Star Heaven. Rather, for purposes of the trial court's award of attorney fees, Barnes prevailed against Flagstar, the awarded attorney fees are properly attributable to conduct by Flagstar, and the attorney fee award is properly enforced by way of judgment against Flagstar, not Star Heaven.

Since the attorney fees are to be enforced on remand through a judgment *against Flagstar*, we agree with Flagstar's assertion that it was improper to award attorney fees for work that was not related to Flagstar. The trial court concluded that, because all the proceedings after February 18, 2010, involved the enforcement of Barnes's construction lien, to be paid from the proceeds of the sale of the remainder of Star Heaven's interest in the property, it did not need to apportion the fees among the various defendants to the action. However, as discussed, because those awards are to be enforced through a judgment against a particular party, it is not reasonable to have that party pay for attorney fees that were incurred for work associated with other

parties. Thus, on remand, the trial court is to assess attorney fees only for work related to Flagstar's contest of Barnes' lien.

## VII. CONCLUSION

We affirm in part, reverse in part, and remand. We affirm the validity and priority of Barnes's construction lien. However, on remand, the trial court is to remove the award of attorney fees to Barnes from the construction lien and enter a separate judgment awarding attorney fees to Barnes against Flagstar. Further, the trial court is to award only the amount of the attorney fees that were incurred as a result of work attributable to Flagstar's actions after February 18, 2010. We do not retain jurisdiction. No costs are taxable pursuant to MCR 7.219, neither party having prevailed in full.

O'CONNELL and K. F. KELLY, JJ., concurred with WILDER, P.J.

BADEEN v PAR, INC

Docket No. 302878. Submitted July 17, 2012, at Detroit. Decided April 11, 2013, at 9:05 a.m. Leave to appeal sought.

George Badeen and Midwest Recovery and Adjustment, Inc., individually and on behalf of a proposed class, brought an action in the Wayne Circuit Court against PAR, Inc., CenterOne Financial Services, L.L.C., and others. In their complaint, Badeen, a licensed collection agency manager, and Midwest Recovery, a licensed collection agency owned by Badeen, alleged, in part, that some of the defendants (the "forwarder defendants") were required to be licensed as "collection agencies" and were not so licensed. The forwarder defendants had contracted with certain lending institutions (the "lender defendants") to handle the collection services on delinquent accounts. After contracting with the lender defendants, the forwarder defendants retained licensed repossession agents to carry out repossessions on behalf of the lender defendants. Plaintiffs alleged that they were harmed, in part, because repossession agents receive less money when hired by forwarding companies than when hired directly by lending institutions. Plaintiffs' complaint was filed on April 5, 2010. On May 14, 2010, plaintiffs filed an amended complaint, which differed from the original complaint only in the naming of a defendant. On July 21, 2010, PAR, Inc., filed a notice of Badeen's failure to file a timely motion for certification that the action may be maintained as a class action, noting that more than 91 days had lapsed from the date the original complaint was filed. Other defendants filed similar notices or joinders in the notice. On July 30, 2010, Badeen filed a motion for class certification. PAR, Inc., and other defendants then filed motions to strike the motion for class certification as untimely. Badeen responded with a motion to strike the notices of failure to file a motion for class certification. The court, Michael F. Sapala, J., held that the 91-day time limit of MCR 3.501(B), within which a plaintiff must move for class certification, ran from the filing of the original complaint, which contained class action allegations, and that plaintiffs' failure to timely file a motion for class certification did not constitute excusable neglect warranting reinstatement of the class action allegations. The court entered an order granting defendants' motion to strike Badeen's motion for class certifica-

tion and denying Badeen's motion to strike the notices of failure to file for class certification or to reinstate the class action allegations. Defendants moved for summary disposition, arguing that all plaintiffs' claims must fail because the forwarder defendants are not collection agencies under the Occupational Code, MCL 339.101 *et seq*., and therefore are not required to be licensed collection agencies. Plaintiffs responded by arguing that the forwarder defendants must be licensed because they solicit lenders to collect claims and are "indirectly" involved in collections. The court granted defendants' motions for summary disposition on the basis that the forwarder defendants were not collection agencies. Plaintiffs appealed.

1. The trial court erred when it determined that plaintiffs' motion to certify the action as a class action was untimely under the 91-day deadline imposed by MCR 3.501(B). The Supreme Court's use of the word "a" in the court rule indicates that a plaintiff may file more than one complaint containing class action allegations. The court rule is properly interpreted as providing that within 91 days after the filing of any complaint that includes class action allegations, the plaintiff must move for certification that the action may be maintained as a class action. Plaintiffs had until July 6, 2010, to move for class certification because they filed their complaint on April 5, 2010. However, MCR 2.118(A) permits a party to amend a pleading once as a matter of course as long as 14 days have not lapsed after receiving a responsive pleading. As of May 14, 2010, no defendants had filed or served any answers to plaintiffs' original complaint. Therefore, pursuant to MCR 2.118(A), plaintiffs were permitted to amend the complaint on May 14, 2010. Because plaintiffs properly amended their original complaint, the original complaint ceased to have any effect and plaintiffs were not required to move for class certification by July 6, 2010. Plaintiffs therefore had 91 days from May 14, 2010, the filing date of the first amended complaint, to move for class certification. Plaintiffs moved for class certification within that period. The trial court erred by holding that the motion for class certification was untimely.

2. The forwarder defendants and the lender defendants have not violated the Occupational Code or the Michigan regulation of collection practices act (MRCPA), MCL 445.251 *et seq*., because the forwarder defendants are not collection agencies under article 9 of the Occupational Code, MCL 339.901 *et seq*. Forwarders are not collection agencies because they do not solicit a claim for collection when they hire collection agencies. The Legislature's use of the term "indirectly" in MCL 333.901(b) does not mean that the

statute applies to forwarders. The forwarder defendants did not directly or indirectly engage in repossessing or attempting to repossess collateral. Because the forwarder defendants were not required to be licensed, they did not violate the Occupational Code and the lender defendants did not violate the MRCPA. The trial court did not err by granting defendants' motions for summary disposition.

Affirmed.

1. ACTIONS — CLASS ACTIONS — MOTIONS AND ORDERS — AMENDED COMPLAINTS.

A plaintiff, within 91 days after the filing of any complaint that includes class action allegations, must move for certification that the action may be maintained as a class action; a party may amend a pleading once as a matter of course as long as 14 days have not lapsed after receiving a responsive pleading; an amended pleading supersedes the former pleading, making the original pleading abandoned and withdrawn; a plaintiff, within 91 days after filing an amended complaint that includes class action allegations, must move for certification that the action may be maintained as a class action (MCR 2.118[A], 3.501[1]).

2. WORDS AND PHRASES — OCCUPATIONAL CODE — COLLECTION AGENCIES — SOLICITING A CLAIM FOR COLLECTION.

The phrase "soliciting a claim for collection" in the section of the Occupational Code that defines a "collection agency" means requesting the debtor to fulfill his or her obligation on the debt (MCL 339.901[b]).

*Xuereb Snow PC* (by *Joseph M. Xuereb* and *John R. Badeen*) for plaintiffs.

*Miller, Canfield, Paddock and Stone, P.L.C.* (by *Larry J. Saylor*), for PAR, Inc.

*Wienner & Gould, P.C.* (by *S. Thomas Wienner* and *Seth D. Gould*), for PNC Bank, CenterOne Financial Services, LLC, and the M. Davis Co., Inc.

*Law Offices of John J. O'Shea, PLC* (by *John J. O'Shea*), and *Reed Smith, LLP* (by *Kim M. Watterson*), for Bank of America, N.A.

*Pepper Hamilton LLP* (by *Matthew J. Lund* and *Adam A. Wolfe*) for TD Auto Finance.

*Debrincat, Padgett, Kobliska & Zick* (by *S. Thomas Padgett*) for Santander Consumer U.S.A., Inc.

*Boyle Burdett* (by *Howard William Burdett, Jr.*) for ASR Nationwide, LLC.

*Myers Nelson Dillon & Shierk, PLLC* (by *James R. Bruinsma* and *Michael Farrell*), for Nissan Motor Acceptance Corporation.

*Warner Norcross & Judd LLP* (by *Aaron D. Lindstrom*, *Molly E. McManus*, and *Michael G. Brady*) for Fifth Third Bank.

*Plunkett Cooney* (by *Jeffrey C. Gerish* and *Matthew J. Boettcher*) for the Huntington National Bank.

*Law Weathers* (by *Crystal L. Morgan* and *Leslie C. Morant*) for Toyota Motor Credit Corporation, Remarketing Solutions, LLC, Renovo Services, LLC, and Diversified Vehicle Services, Inc.

*Collins, Einhorn, Farrell & Ulanoff* (by *Deborah Hebert* and *Kevin Moloughney*) for Millennium Capital and Recovery Corporation.

*Blanco Wilczynski, P.L.L.C.* (by *Derek S. Wilczynski*), for National Asset Recovery Corp.

Before: METER, P.J., and FITZGERALD and WILDER, JJ.

WILDER, J. On appeal, plaintiffs argue that (1) the trial court erred when it struck plaintiffs' motion for class certification, (2) the trial court erred when it denied plaintiffs' motion to reinstate the class action

allegations, and (3) the trial court erred when it granted summary disposition in favor of defendants. We affirm.

This case involves "forwarding companies" that contract with lending institutions to handle the collection services on delinquent accounts. After contracting with the lending institutions, these forwarding companies would in turn retain licensed repossession agents to carry out repossessions on behalf of the lenders. Plaintiffs allege that the forwarding companies themselves need to be licensed as "collection agencies," and their failure to do so is the underlying basis for plaintiffs' lawsuit.

## I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiff George Badeen, a licensed collection agency manager, owns plaintiff Midwest Recovery and Adjustment, Inc. (Midwest Recovery). Midwest Recovery is a licensed collection agency that is hired by automobile lenders to repossess financed vehicles whose owners have defaulted on their loans. In the past, automobile lenders would contract directly with repossession agents, like Midwest Recovery. However, more recently, lenders are contracting with forwarding companies. Apparently, repossession agents receive less money when hired by forwarding companies than when hired directly by lending institutions. Plaintiffs claim that this practice has caused them harm.

On April 5, 2010, plaintiffs filed a complaint against defendants, which include forwarding companies (the "forwarder defendants")[1] and lending institutions (the

[1] The forwarder defendants are PAR, Inc., doing business as PAR North America; CenterOne Financial Services, L.L.C.; First National Repossessors, Inc.; Millennium Capital and Recovery Corporation; MV Connect, L.L.C., doing business as IIA, L.L.C.; Renovo Services, L.L.C.;

"lending defendants").[2] In count one of the complaint, plaintiffs sought certification of a class action, in which Badeen would represent the interests of all automobile repossession agencies and their owners who held a license to collect debts in Michigan in the preceding six years. In count two, plaintiffs sought an injunction prohibiting the forwarder defendants from violating the Occupational Code, MCL 339.101 *et seq.*, by soliciting or performing collection activities in Michigan without a license. In count three, plaintiffs asserted a claim of civil conspiracy, alleging that the forwarder defendants and lender defendants "acted in concert to violate the Occupational Code." In count four, plaintiffs alleged that the forwarder defendants intentionally interfered with plaintiffs' business relations with the lender defendants. In count five, plaintiffs alleged that the forwarder defendants intentionally interfered with plaintiffs' contracts with the lender defendants. In count six, plaintiffs asserted a claim of negligence per se against the forwarder defendants for breach of their statutory duty under the Occupational Code.

On May 14, 2010, plaintiffs filed an amended complaint, which differed only in the naming of a defendant (Remarketing Solutions was named in place of Manheim Recovery Solutions). On September 8, 2010, plaintiff filed a second amended complaint, which differed from the first amended complaint in several substantive ways. In count two of the second amended complaint, plaintiffs sought to enjoin the lender defendants from hiring unlicensed debt

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Renaissance Recovery Solutions, Inc.; ASR Nationwide, L.L.C.; Diversified Vehicle Services, Inc.; National Asset Recovery Corp.; and Manheim Recovery Solutions.

[2] The lender defendants are TD Auto Finance, L.L.C.; Toyota Motor Credit Corporation; Nissan Motor Acceptance Corporation; Santander Consumer U.S.A.; PNC Bank, N.A.; Bank of America, N.A.; Fifth Third Bank; GE Money Bank; and the Huntington National Bank.

collectors. In count three, plaintiffs alleged that the forwarder defendants and the lender defendants acted in concert to violate both the Occupational Code and the Michigan regulation of collection practices act (MRCPA), MCL 445.251 *et seq*. In count six, plaintiffs alleged that the lender defendants also violated their statutory duty under the MRCPA. In two additional counts, plaintiffs alleged violations of the Occupational Code and the MRCPA. Several defendants filed answers to the complaint or amended complaints.

### A. CLASS ACTION CERTIFICATION

On July 21, 2010, PAR, Inc. (PAR), filed a notice of Badeen's failure to file a timely motion to certify a class pursuant to MCR 3.501(B), claiming that more than 91 days had lapsed from the date of the original complaint alleging a class action. Other defendants filed similar notices or joinders in the notice.

On July 30, 2010, Badeen filed a motion for class certification, arguing that he was a member of the proposed class; that the proposed class was numerous, making joinder impracticable; that common questions predominated; that his claims were typical of the class; that he would adequately assert and protect the class; and that a class action would be superior.

PAR filed a motion to strike Badeen's motion for class certification, contending that Badeen's motion was untimely. PAR argued that once it filed its notice, the class action allegations were deemed stricken as a matter of law and, as a result, Badeen needed to first seek leave of the court to reinstate his class action allegations before he was permitted to move for class action certification. Other defendants filed similar objections to the motion for class certification or concurrences in PAR's motion.

On August 11, 2010, Badeen filed a motion to strike the notices of failure to file a motion for class certification. In the brief in support of the motion, Badeen argued that the 91-day time limit provided in MCR 3.501(B) runs from the date of the filing of the most recent amended complaint containing class action allegations because the court rule uses the word "a," not "the." Alternatively, Badeen argued that the class action allegations should be reinstated because his attorney's "misconception of the court rule" constituted excusable neglect as permitted under the court rule.

On August 20, 2010, PAR filed a brief in opposition to Badeen's motion to strike. PAR argued that the 91-day time limit runs from the filing of the first complaint containing class action allegations based on the language and purpose of the rule. PAR further argued that misinterpretation of a court rule does not constitute excusable neglect.

On August, 25, 2010, the trial court held a hearing on the cross-motions to strike. The parties' arguments were consistent with their briefs, but defendants additionally argued that plaintiffs would not be prejudiced if the class action allegations were stricken. The trial court held that the 91-day time limit ran from the filing of the original complaint containing class action allegations and that plaintiffs' failure to timely file a motion for class certification did not constitute excusable neglect warranting reinstatement of the class action allegations. On September 13, 2010, the trial court entered an order granting PAR's motion to strike Badeen's motion for class certification and denying Badeen's motion to strike the notices of failure to file for class certification or to reinstate the class action allegations.

B. SUMMARY DISPOSITION

On October 6, 2010, both the forwarder defendants and the lender defendants moved for summary disposition pursuant to MCR 2.116(C)(8). Primarily, they argued that because forwarders are not collection agencies under the Occupational Code, all plaintiffs' claims necessarily fail. Plaintiffs responded by arguing, in part, that forwarders must be licensed because they solicit lenders to collect claims and are "indirectly" involved in collections.

After holding a hearing, the trial court entered an opinion and order on February 14, 2011, granting defendants' motions for summary disposition. The trial court found that the statutes at issue were unambiguous, that the forwarder defendants were not collection agencies, and that, therefore, plaintiffs failed to state a claim on which relief could be granted. Plaintiffs' appeal to this Court ensued.

II. STANDARDS OF REVIEW

We review issues of statutory interpretation de novo. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011). This Court must begin by considering the language of the statute. *Rambin v Allstate Ins Co*, 297 Mich App 679, 684; 825 NW2d 95 (2012).

> In interpreting a statute, a court's goal is to give effect to the Legislature's intent. A court may not construe a statute unless it is ambiguous; if the statute is unambiguous, the court will apply it as written. If a statute is ambiguous, construction is permitted, and the rules of statutory construction "merely serve as guides" toward the ultimate goal of discerning the intent of the Legislature. "[A] provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision or when it is *equally* susceptible to more than a single meaning." [*East*

*Lansing v Thompson*, 291 Mich App 34, 36-37; 804 NW2d 567 (2010) (citations omitted).]

A trial court's decision on a motion for summary disposition is also reviewed de novo. *Coalition for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362, 367; 820 NW2d 208 (2012). "MCR 2.116(C)(8) tests whether a claimant has failed to state a cognizable claim. For purposes of a motion for summary disposition under MCR 2.116(C)(8), this Court accepts all well-pleaded factual allegations as true, and construes them in a light most favorable to the nonmoving party." *Id*.

"The interpretation and application of court rules present questions of law to be reviewed de novo using the principles of statutory interpretation." *Lamkin v Engram*, 295 Mich App 701, 707; 815 NW2d 793 (2012). Thus, the goal in interpreting is to give effect to the rulemaker's intent as expressed in the court rule's terms, giving the words their plain and ordinary meaning. *Peterson v Fertel*, 283 Mich App 232, 235-236; 770 NW2d 47 (2009). " 'If the language poses no ambiguity, this Court need not look outside the rule or construe it, but need only enforce the rule as written.' " *Id*. at 236 (citation omitted). But "[i]f judicial construction is required, this Court must adopt a construction that best accomplishes the purpose of the court rule. While the Court may consider a variety of factors, it should always use common sense." *Vyletel-Rivard v Rivard*, 286 Mich App 13, 22; 777 NW2d 722 (2009) (citations omitted).

## III. ANALYSIS

### A. CLASS CERTIFICATION

Plaintiffs first argue that the trial court erred when it determined that plaintiffs' motion to certify the action as a class action was untimely under the 91-day

deadline imposed by MCR 3.501. We agree, but for reasons hereinafter stated, plaintiffs are not entitled to any relief on appeal.

Badeen filed his motion for class certification on July 30, 2010. This was within 91 days of the filing of the first amended complaint on May 14, 2010, but more than 91 days after the filing of the original complaint on April 5, 2010. Both the original and amended complaints contained the same class action allegations. Because there are no decisions of this Court or the Michigan Supreme Court addressing whether the motion for class certification must be filed within 91 days of the original complaint or an amended complaint, this is an issue of first impression.

This Court must first consider the language of the court rule. *Vyletel-Rivard*, 286 Mich App at 22. The court rule governing class actions is MCR 3.501. MCR 3.501(B) provides, in part:

> (1) *Motion.*
>
> (a) Within 91 days after the filing of *a complaint* that includes class action allegations, the plaintiff must move for certification that the action may be maintained as a class action.
>
> (b) The time for filing the motion may be extended by order on stipulation of the parties or on motion for cause shown. [Second emphasis added.]

The Supreme Court's use of the word "a" indicates that a plaintiff may file more than one complaint containing class action allegations, as in this case. See *Robinson v City of Lansing*, 486 Mich 1, 14; 782 NW2d 171 (2010) (noting that "the" and "a" have different meanings and that "the" is a *definite* article and "a" is an *indefinite* article). Further, while there are many dictionary definitions of the word "a," the definitions most pertinent to this case are "any" or "every." *Random House*

*Webster's College Dictionary* (1997). Accordingly, the court rule is properly interpreted as meaning that "[w]ithin 91 days after the filing of [*any*] complaint that includes class action allegations, the plaintiff must move for certification that the action may be maintained as a class action."

Because plaintiffs filed their original complaint on April 5, 2010, plaintiffs had 91 days, or until July 6, 2010,[3] to move for class certification. However, MCR 2.118(A) allows a party to amend a pleading once as a matter of course as long as 14 days have not lapsed after receiving a responsive pleading. As of May 14, 2010, no defendants had filed or served any answer to plaintiffs' original complaint. Thus pursuant to MCR 2.118(A), plaintiffs were permitted to amend the complaint on May 14, 2010.

Having properly amended their original complaint, plaintiffs' original complaint ceased to have any effect, and plaintiffs were not required to move for class certification by July 6, 2010. As this Court has explained, an amended pleading supersedes the former pleading, making the original pleading " 'abandoned and withdrawn.' " *Grzesick v Cepela*, 237 Mich App 554, 562; 603 NW2d 809 (1999), citing MCR 2.118(A)(4) and quoting 61B Am Jur 2d, Pleading, pp 92-93; see also *Nippa v Botsford Gen Hosp*, 251 Mich App 664, 679; 651 NW2d 103 (2002), vacated and remanded on other grounds 468 Mich 882 (2003). Because the original complaint became "abandoned and withdrawn" by virtue of the filing of the first

[3] Ninety one days from April 5, 2010, is actually July 5, 2010, but the court was closed that day for the Independence Day holiday. Thus, pursuant to MCR 1.108, the next available day that is not a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order is used.

amended complaint, the July 6, 2010, deadline tied to the original complaint no longer had any effect. Therefore, consistent with our interpretation of MCR 3.501, plaintiffs had 91 days from the May 14, 2010, filing of the first amended complaint to move for class certification. Because plaintiffs moved for class certification on July 30, 2010, within 91 days of May 14, 2010, the date the first amended complaint was filed, we conclude that the trial court erred when it held that plaintiffs' motion was untimely under the court rule.

We reject as unwarranted defendants' contention that permitting an amended complaint to effectively "restart the clock," would introduce undue delay in the initiation of class action litigation. While the timing requirement at issue "was designed to prevent cases from remaining pending for extended periods without the propriety of a class action being raised," *Hill v City of Warren*, 276 Mich App 299, 306; 740 NW2d 706 (2007) (quotation marks omitted), citing GCR 1963, 208.2(A), the predecessor rule to MCR 3.501(B)(1), a plaintiff may amend its complaint only once as a matter of course and, even then, under significant timing restrictions. MCR 2.118(A)(1). If a plaintiff wishes to amend its complaint after the time for doing so as a matter of course has expired, the plaintiff must then either obtain the defendant's consent or obtain the trial court's permission. MCR 2.118(A)(2). The time limitations and additional requirements concerning amendments of complaints are more than sufficient to prevent "cases from remaining pending for extended periods without the propriety of a class action being raised." *Hill*, 276 Mich App at 306 (quotation marks and citation omitted).

B. COLLECTION AGENCIES UNDER THE MRCPA AND THE OCCUPATIONAL CODE

Having concluded that the trial court erred by granting PAR's motion to strike Badeen's motion for class certification, we next consider plaintiffs' assertion that the trial court erred by holding that defendants were not collection agencies within the meaning of the Occupational Code and granting summary disposition in favor of defendants on that basis. Because we hold that the trial court properly determined that defendants did not violate either the MRCPA or the Occupational Code, we affirm the trial court's ruling.

Article 6 of the Occupational Code, MCL 339.601 *et seq*., provides that "[a] person shall not engage in or attempt to engage in the practice of an occupation regulated under this act or use a title designated in this act unless the person possesses a license or registration issued by the department for the occupation." MCL 339.601(1). MCL 339.904, under the Occupational Code, in turn, prohibits anyone from "operat[ing] a collection agency or commenc[ing] in the business of a collection agency without" being licensed. Plaintiffs claim that the forwarder defendants have violated these sections by acting as collection agencies without being licensed.

MCL 445.252(s) of the MRCPA prohibits a "regulated person" from "[e]mploying a person required to be licensed under article 9 of [the Occupational Code MCL 339.901 to 339.916] to collect a claim unless that person is licensed under article 9 [MCL 339.901 to 339.916]." Plaintiffs claim that the lender defendants have violated this provision by hiring the forwarder defendants to collect claims without the forwarder defendants being licensed.

We find that the forwarder defendants and lender defendants have not violated the Occupational Code or the MRCPA because the forwarder defendants are not "collection agencies" under Article 9 of the Occupational Code. MCL 339.901(b) defines "collection agency" as

> a person directly or indirectly engaged in soliciting a claim for collection or collecting or attempting to collect a claim owed or due or asserted to be owed or due another, or repossessing or attempting to repossess a thing of value owed or due or asserted to be owed or due another arising out of an expressed or implied agreement.

The plain and unambiguous language supports the trial court's finding that forwarders are not collection agencies because forwarders do not "solicit a claim for collection" when they hire collection agencies. "Solicit" is defined, in part, as "to try to obtain by earnest plea or application," and "to make a petition or request for something desired." *Random House Webster's College Dictionary* (2001). MCL 339.901(a) provides that "claim" and "debt" both have the exact same meaning, primarily "an obligation or alleged obligation for the payment of money . . . ." As a result, the phrase "soliciting a claim for collection," found in MCL 339.901(b), means requesting *the debtor* to fulfill his or her obligation on the debt.

Further, the Legislature's use of the word "indirectly" in MCL 339.901(b) does not indicate that the statute applies to forwarders. The phrase "directly or indirectly engaged in" applies to both the phrase preceding the comma and the phrase after the comma. Thus, a collection agency includes a person who "directly or indirectly engaged in . . . repossessing or attempting to repossess a thing of value owed . . . ." Grammatically, the comma technically does not belong

in the statute because the phrase "repossessing or attempting to repossess a thing of value" is not an independent clause. See Strunk & White, *The Elements of Style* (New York: Longman, 4th ed, 2000), p 5 (noting that a comma is used before a conjunction when it introduces an independent clause). This phrase is not independent because it is clear that the phrase's subject is found back at the beginning of the sentence in another phrase, "a person." However, because of the inordinate number of "ors" in the statute, we discern that the use of the comma was to help identify the two main components of the definition. And because the form of the word "soliciting" matches the form of the word "repossessing," we are convinced that the Legislature intended for "directly or indirectly engaged in" to apply to both similarly, otherwise, the pattern of the section would be asymmetric.

Thus, the issue boils down to whether the forwarder defendants "directly or indirectly engaged in repossessing or attempting to repossess" collateral. We conclude that they did not. "Engage" means, in part, "to occupy the attention or efforts of; involve." *Random House Webster's College Dictionary* (1997). And "occupy" is defined, in part, as "to fill up, employ, or engage." *Id*. Plaintiffs' complaint alleges that the forwarder defendants hired and contracted with "local, licensed, Michigan debt collection agencies to repossess the collateral sought to be seized." However, the fact that the forwarder defendants contracted out the work demonstrates that they were *not* "occupied" or "involved" with the act of repossession itself. There were no allegations that the forwarding defendants had any involvement or input whatsoever with the actual repossession effort process, and we decline to find that a forwarder who contracts out the *actual repossession process* is "indirectly engaged in repossessing or at-

tempting to repossess." Such an extension of the process would be too attenuated.

Our construction of the phrase "indirectly engaged in repossessing or attempting to repossess" is consistent with the purpose of the statute "to protect the debtor and the creditor from the potentially improper acts of a third-party collection agency." *Asset Acceptance Corp v Robinson*, 244 Mich App 728, 732; 625 NW2d 804 (2001). Because forwarders are not involved with "collection activities" (they do not collect debts, they do not contact consumers, and they are not involved with the actual act of repossession), requiring them to be licensed would not further the purpose of the statute.

Because forwarders are not required to be licensed, the forwarder defendants did not violate the Occupational Code, and the lender defendants did not violate the MRCPA. Accordingly, the trial court did not err by granting defendants' motions for summary disposition.

Affirmed. No costs are taxable pursuant to MCR 7.219, neither party having prevailed in full.

METER, P.J., and FITZGERALD, J., concurred with WILDER, J.

ORTHOPAEDIC ASSOCIATES OF GRAND RAPIDS, PC v
DEPARTMENT OF TREASURY

Docket No. 308319. Submitted February 7, 2013, at Lansing. Decided February 19, 2013. Approved for publication April 11, 2013, at 9:10 a.m.

Orthopaedic Associates of Grand Rapids, PC, appealed in the Tax Tribunal a final tax assessment that the Department of Treasury issued after it audited petitioner's tax returns for the years 2003 through 2006. Respondent concluded that petitioner had erred by treating the payments it had made for its physicians' continuing medical education and medical malpractice insurance premiums as ordinary business expenses rather than compensation under the Single Business Tax Act (SBTA), MCL 208.1 *et seq*., which has since been repealed but was applicable during the tax years at issue. The Tax Tribunal, Cynthia J. Knoll, J., reversed, canceled the assessment, and denied respondent's motion for reconsideration. Respondent appealed.

The Court of Appeals *held*:

Petitioner's payments for its members' continuing medical education and medical malpractice insurance premiums constituted compensation under the SBTA, which defined "compensation" as all wages, salaries, fees, bonuses, commissions, or other payments made in the taxable year on behalf of or for the benefit of employees, and specified that compensation included but was not limited to payments that were subject to or specifically exempt or excepted from withholding under 26 USC 3401 through 3406.

Reversed.

TAXATION — PROFESSIONAL CORPORATIONS — SINGLE BUSINESS TAX ACT — COMPENSATION — PAYMENTS FOR EMPLOYEES' CONTINUING MEDICAL EDUCATION AND MEDICAL MALPRACTICE INSURANCE PREMIUMS.

Payments made by a medical professional corporation for the cost of its members' continuing medical education and medical malpractice insurance premiums constituted compensation under the now repealed Single Business Tax Act, MCL 208.1 *et seq*.

*The Novis Law Firm, PLLC* (by *James H. Novis*), for petitioner.

*Bill Schuette*, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Randi M. Merchant* and *Jack M. Panitch*, Assistant Attorneys General, for respondent.

Before: K. F. KELLY, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM. Respondent appeals as of right a determination of the Michigan Tax Tribunal (MTT) that payments made by petitioner for continuing medical education (CME) expenses and for medical malpractice insurance (MMI) premiums did not constitute compensation under the Single Business Tax Act (SBTA), MCL 208.1 *et seq*.[1] We reverse.

## I. BASIC FACTS

Petitioner is a Michigan domestic professional services corporation, incorporated pursuant to the Professional Service Corporation Act (PSCA), MCL 450.221 *et seq*.[2] Petitioner is engaged in a medical practice specializing in orthopedic medicine. All of its directors, officers, and shareholders are practicing physicians, and the medical practice operates through the work of these individual physicians and their support personnel. In 2003, petitioner paid salaries to the individual physicians, but in 2004 petitioner assigned its employment agreements to three different employee leasing compa-

[1] The SBTA was repealed by 2006 PA 325 and replaced, effective December 31, 2007, by the Michigan Business Tax Act, 2007 PA 36, MCL 208.1101 *et seq*.

[2] The PSCA was repealed by 2012 PA 569.

nies or professional employer organizations (PEOs). From 2004 through 2006, the PEOs paid the physicians' salaries. For all of the tax years at issue, petitioner paid MMI premiums and CME expenses for its physicians.

In April 2009, respondent audited petitioner's tax returns for the years 2003 through 2006 and concluded that petitioner failed to properly add back as compensation amounts paid for CME and MMI premiums. Respondent issued a final assessment for $29,167 in taxes plus $9,826.71 in interest. Petitioner appealed the assessment to the MTT.

At the hearing, Thomas Murphy, the certified public accountant who prepared petitioner's tax returns for the years at issue, testified that he treated petitioner's payment of CME expenses and MMI premiums as "ordinary business expenses," not "compensation." He asserted that the CME expenses and MMI premiums were a working condition fringe benefit under the Internal Revenue Code—specifically, 26 USC 3401(a)(19)—as an excludable benefit that was not subject to federal withholding and not considered compensation. Murphy explained that under the SBTA, compensation included, but was not limited to, payments that were subject to or specifically exempted from withholding under sections 3401 to 3406 of the Internal Revenue Code, 26 USC 1 *et seq*., which included the provision he had referred to in describing how he classified the payments. Murphy testified that professional MMI is different from other professional insurance that covers, for example, a firm composed of certified public accountants. A medical malpractice insurer will only issue coverage to a doctor, individually. A medical professional corporation may then purchase a "rider" of insurance to cover its other employees and the corporation. Murphy acknowledged that CME is necessary for annual licensure.

In a written opinion, the MTT found for petitioner and canceled the assessment, ruling that the physicians and physician's assistants were not "employees" of petitioner and that the CME and MMI premiums paid by petitioner were "ordinary and necessary business expenses" that did not constitute compensation.

Respondent moved the MTT for reconsideration. After considering the motion, the MTT found that it had "partially erred in [its] analysis" but that "the error [did] not change the ultimate outcome of the case." The MTT reiterated that "[r]espondent's argument regarding whether the compensation would be appropriately added back to the compensation of the operating company or the PEO was properly excluded as the CME and MMI premiums were found to be business expenses and not compensation." The MTT stated that its "analysis would have been better articulated by making a finding that for *all tax years* that the CME and MMI premiums paid were ordinary and necessary business expenses and not compensation." The MTT denied respondent's motion and ordered that the original final opinion and judgment be corrected. Respondent now appeals as of right.

## II. STANDARD OF REVIEW

As a preliminary matter, we reject petitioner's contention that this is a case involving a simple factual determination by the MTT; rather, the case is clearly a matter of statutory interpretation. Thus, while our " 'review of Tax Tribunal decisions in nonproperty tax cases is limited to determining whether the decision is authorized by law and whether any factual findings are supported by competent, material, and substantial evidence on the whole record' . . . [i]ssues involving the interpretation and application of statutes are reviewed

de novo as questions of law." *Toaz v Dep't of Treasury*, 280 Mich App 457, 459; 760 NW2d 325 (2008), quoting *J C Penney Co, Inc v Dep't of Treasury*, 171 Mich App 30, 37; 429 NW2d 631 (1988); see also Const 1963, art 6, § 28.

"The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011). The words used by the Legislature in writing a statute provide us with the most reliable evidence of the Legislature's intent. *Id*. While generally the interpretation of a statute by an agency charged with its execution is entitled to " 'the most respectful consideration,' " an agency's construction of a statute is not binding on the courts and cannot conflict with the Legislature's intent as expressed in clear statutory language. *In re Rovas Complaint Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008) quoting *Boyer-Campbell v Fry*, 271 Mich 282, 296; 260 NW 165 (1935) (citation and quotation marks omitted). To the extent petitioner argues that CME expenses and MMI premiums are exempt from being considered "compensation" within the meaning of the SBTA, tax exemptions are strictly construed in favor of the taxing authority. *Sietsema Farms Feeds, LLC v Dep't of Treasury*, 296 Mich App 232, 236; 818 NW2d 489 (2012).

The Legislature defined "compensation" in MCL 208.4(3). "When a statute specifically defines a given term, that definition alone controls." *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007).

## III. ANALYSIS

The SBTA imposed "a specific tax upon the adjusted tax base of every person with business activity in this

state that is allocated or apportioned to this state . . . ." MCL 208.31(1). "The SBTA requires generally that in calculating its Single Business Tax (SBT) tax base, a corporation include compensation paid." *Herald Wholesale, Inc v Dep't of Treasury*, 262 Mich App 688, 696; 687 NW2d 172 (2004). Respondent argues that petitioner's payment of CME expenses and MMI premiums constituted "compensation" as defined in MCL 208.4(3), which provided, in relevant part:

> Except as otherwise provided in subsection (4), "compensation" means all wages, salaries, fees, bonuses, commissions, or other payments made in the taxable year *on behalf of or for the benefit of employees*, officers, or directors of the taxpayers. Compensation includes, *but is not limited to*, payments that are subject to or specifically exempt or excepted from withholding under sections 3401 to 3406 of the internal revenue code[, 26 USC 3401 to 3406]. [Emphasis added.]

Petitioner argues that its payment of CME expenses and MMI premiums was for its own benefit, not that of its employees. Petitioner contracts with large health care delivery organizations that require petitioner to provide licensed and insured physicians and physician's assistants. Accordingly, petitioner argues that payment of CME and MMI was necessary to operate its business. Petitioner maintains that such payments only residually benefited the employees.

The PSCA prohibited a professional corporation, such as petitioner, from "render[ing] professional services within this state except through its officers, employees, and agents who are duly licensed or otherwise legally authorized to render the professional services within this state." MCL 450.225. The Public Health Code, MCL 333.1101 *et seq*., requires all practicing physicians to be licensed. MCL 333.17011(1). The Michigan Administrative Code requires 150 hours of

CME as a prerequisite for license renewal or relicensure. Mich Admin Code, R 338.2371. Thus, physicians are legally obligated to attend CME classes in order to remain licensed. Additionally, petitioner's own expert testified that MMI is issued only to individual physicians. Thus, regardless of whether petitioner benefited from paying for CME and MMI, those payments benefited the physicians, who would have otherwise had to pay their own CME for continued licensure and MMI to reduce their exposure to liability and potential personal financial ruin.

Moreover, the Supreme Court has held that the provision "including but not limited to" is not one of limitation. *In re Forfeiture of $5,264*, 432 Mich 242, 255; 439 NW2d 246 (1989). "Rather . . . the phrase connotes an illustrative listing, one purposefully capable of enlargement." *Id*. There is no language in MCL 208.4(3) to support the proposition that payments made must be primarily, substantially, or totally "on behalf of or for the benefit of" petitioner's employees in order to constitute compensation.

Petitioner relies on *Ford Motor Co v Dep't of Treasury*, 288 Mich App 491; 794 NW2d 357 (2010), in which a panel of this Court had occasion to interpret MCL 208.4(3). In that case, the plaintiff had made contributions to "an irrevocable trust created under a voluntary employees' beneficiary association (VEBA), 26 USC 501(c)(9)," exceeding those required by the applicable union contract. *Id*. at 492, 498. Individual "employees submitted bills for health-care services covered under the employee health-care plan to plaintiff, and plaintiff would pay the bills and receive reimbursement from the VEBA trust." *Id*. at 493-494. After conducting an audit, the defendant "concluded that the contributions made into the VEBA trust . . . were taxable compensation and

should have been added to plaintiff's tax base and then 'offset' by the amounts . . . reimbursed [to] plaintiff . . . ." *Id*. at 494. The plaintiff disputed the assessment in the Court of Claims, which granted summary disposition in favor of the defendant. *Id*. at 492-493. This Court reversed, holding that the contributions made by the plaintiff to the VEBA did not constitute compensation under the SBTA. *Id*. at 493.

The facts in *Ford Motor Co* are distinguishable from those at bar. In *Ford Motor Co*, the VEBA trust essentially operated as a savings fund for the plaintiff. The plaintiff reimbursed itself with VEBA funds after paying contractually obligated health-care benefits to its employees. Here, petitioner directly paid CME expenses and MMI premiums for its employees. In *Ford Motor Co*, although plaintiff's contributions to the VEBA trust were not compensation under the SBTA, its payment of employee health-care benefits undisputedly constituted compensation. Unlike in *Ford Motor Co*, petitioner's payment of CME expenses and MMI premiums was not merely *potential* compensation of its employees; rather, they were made in the taxable year for the benefit of individual employees. Contrary to petitioner's contention, *Ford Motor Co* never held that payments with "indirect" or "residual" benefit to its employees are not compensation.

Because petitioner's payment of CME expenses and MMI premiums was on behalf of and for the benefit of the physicians and physician's assistants in its employ, those payments constituted compensation for purposes of petitioner's SBT tax base calculation.

Reversed and remanded for entry of an order consistent with this opinion. We do not retain jurisdiction.

K. F. KELLY, P.J., and MARKEY and FORT HOOD, JJ., concurred.

BARCLAE v ZARB

Docket No. 299986. Submitted April 2, 2013, at Detroit. Decided April 16, 2013, at 9:00 a.m.

Anthony L. Barclae, CYNBA International, Inc., and Robot Defined, LLC, brought an action in the Wayne Circuit Court against Ernest M. Zarb, a senior vice president of Comerica Bank, alleging, in part, that Zarb made fraudulent misrepresentations to plaintiffs before Robot Defined and Comerica Bank entered into a debt purchase agreement wherein Robot Defined agreed to purchase outstanding loans made by Comerica Bank to Robot Printing, Inc., and Robot Properties, L.L.C. The same day the debt purchase agreement was executed, Comerica Bank, Robot Printing, and Robot Properties executed a forbearance agreement in which Comerica Bank agreed to forbear from taking action in regards to defaults on the loans at issue in the debt purchase agreement. Zarb answered, denying that he made false statements and claiming that neither he, Barclae, or CYNBA were parties to the debt purchase agreement or the forbearance agreement. Plaintiffs filed a demand for a jury trial, which Zarb moved to strike. The court, Robert L. Ziolkowski, J., granted the motion to strike. The Court of Appeals granted plaintiffs' application for leave to appeal in an unpublished order, entered April 29, 2009 (Docket No. 289878). The Court of Appeals then reversed the order granting the motion to strike and remanded the matter to the trial court, concluding that the plain language of the jury trial waiver did not extend to agents, such as Zarb, who did not sign the contract in their individual capacities. *Barclae v Zarb*, unpublished opinion per curiam, issued January 18, 2011 (Docket No. 289878). While the appeal was pending, plaintiffs filed a second amended complaint in which they alleged, in part, that they had been unaware when Zarb told them that they could purchase Robot Printing's assets that Robot Printing had already sold the "Robocolor Process" asset in order to reduce the debt owed to Comerica Bank and procure working capital. Comerica Bank then filed a separate suit against Robot Defined, alleging breach of contract and seeking indemnification for losses arising out of Robot Defined's failure to consummate the debt sale agreement

after it learned that the Robocolor Process had already been sold. Robot Defined counterclaimed for the loss of the money it advanced to Robot Printing as a result of Comerica Bank's alleged fraud and seeking Robot Printing's receivables allegedly wrongfully retained by Comerica Bank under theories of breach of contract, fraud, conversion, and unjust enrichment. It also alleged that the bank had retained Robot Defined's nonrefundable deposit and had therefore elected its remedy and could not seek indemnification. The court consolidated the two actions, retaining the title and docket number of the action brought by Barclae. Zarb moved for summary disposition, arguing, in part, that the statute of frauds, MCL 566.132, was applicable and precluded plaintiffs' action. Comerica bank also moved for partial summary disposition with regard to the majority of Robot Defined's counterclaims. The court granted the motions by Zarb and Comerica Bank. The court held that the statute of frauds was applicable, that a financial accommodation had been reached for purposes of application of the statute of fraud, and that Zarb was an agent of Comerica Bank. The only issue remaining in the consolidated cases was Comerica Bank's indemnity claim against Robot Defined. The court entered an order dismissing the claims of Barclae, CYNBA, and Robot Defined (hereafter "plaintiffs") against Zarb and the counterclaims against Comerica Bank. Plaintiffs appealed.

The Court of Appeals *held*:

1. The trial court did not err by applying MCL 566.132 to plaintiffs' claims. The statute plainly states that a party is precluded from bringing a claim, no matter its label, against a financial institution to enforce the terms of an oral promise to waive a loan provision.

2. There was clearly a "financial accommodation" in this case for purposes of MCL 566.132(2). The bank, through Zarb, agreed that it would not pursue immediate liquidation of Robot Printing's assets, even though Robot Printing had defaulted on its loan obligations to the bank. The agreement to temporarily withhold seizing collateral was a financial accommodation that benefited Robot Printing and plaintiffs. The fact that the bank did not place itself at additional risk of exposure to loss is not dispositive of the question whether a financial accommodation was reached.

3. The "present agreement" generated by Zarb at the parties' April 20, 2007, meeting does not meet the signed writing requirement of MCL 566.132 because there was no mutuality of agreement to form a valid contract. The trial court properly concluded that the document did not satisfy the statute of frauds.

4. The law of the case resulting from the prior decision of the Court of Appeals in this matter is that Zarb was acting as an agent of Comerica Bank during the parties' negotiations. As an agent of a financial institution, Zarb could avail himself of the statute of frauds defense.

5. Plaintiffs never performed any aspect of the alleged agreement, therefore, their claim that their partial performance precluded the application of MCL 566.132 was not supported by the evidence.

6. Plaintiffs failed to prove that Zarb owed them a duty to reveal that the Robocolor Process had been sold or that Zarb's failure to disclose the sale was calculated to defraud plaintiffs. Plaintiffs failed to demonstrate that their damages were the result of the alleged silent fraud. Plaintiffs did not prove their silent fraud claim.

7. Parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary a written contract, is not admissible to vary the terms of a clear and unambiguous contract. When a contract contains an explicit merger clause, parol evidence is inadmissible to determine whether the contract was merged. Fraud makes a contract voidable at the instance of the innocent party and parol evidence may be admissible to demonstrate fraud. However, only certain types of fraud would vitiate a contract where there is a valid merger clause. When a contract contains a valid merger clause, the only fraud that could vitiate the contract is fraud that would invalidate the merger clause itself, i.e., fraud relating to the merger clause or fraud that invalidates the entire contract including the merger clause.

8. Because plaintiffs do not seek to add to or vary the terms of the May 4 debt purchase agreement, parol evidence could be introduced to show that plaintiffs were fraudulently induced into signing the agreement.

9. Plaintiffs had standing to bring their action.

10. The trial court did not err by dismissing Robot Defined's claim against Comerica Bank regarding the return of its $500,000 deposit.

11. The trial court properly held that Comerica Bank was under no obligation to share the receivables of Robot Printing with Robot Defined.

12. Because Robot Defined sought to enforce an oral agreement and the statute of frauds precludes such claims, Robot Defined's claims for conversion, fraud, and unjust enrichment may not succeed.

Affirmed.

1. STATUTE OF FRAUDS — ORAL PROMISES — FINANCIAL INSTITUTIONS.

The statute of frauds precludes a party from bringing a claim, no matter its label, against a financial institution to enforce the terms of an oral promise to waive a loan provision.

2. STATUTE OF FRAUDS — WORDS AND PHRASES — FINANCIAL ACCOMMODATIONS.

A financial institution's agreement to temporarily withhold seizing the collateral of a party that has defaulted on its loan obligations to the financial institution is a "financial accommodation" for purposes of the statute of frauds; a financial institution need not be exposed to an additional risk of loss as a result of the financial accommodation in order for the writing requirement of the statute of frauds to apply (MCL 566.132).

3. STATUTE OF FRAUDS — WRITINGS.

A writing, to satisfy the statute of frauds, need not contain all the terms of the agreement; the admitted facts and extrinsic evidence showing the surrounding circumstances may be considered in determining whether a writing satisfies the statute of frauds (MCL 566.132).

4. CONTRACTS — REQUIREMENTS OF VALID CONTRACT.

A valid contract requires parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation.

5. AGENCY — CONTRACTS.

An agent can sue in his or her name to enforce a contract only when the agent has contracted with the other party on behalf of the principal in the agent's own name or in such manner so as to make it the agent's personal contract.

6. AGENCY — STATUTE OF FRAUDS — EMPLOYEES OF FINANCIAL INSTITUTIONS.

A financial institution can act only through its agents, principals, and employees; employees of financial institutions are protected under the provisions of the statute of frauds pertaining to financial institutions (MCL 566.132[2] and [3]).

7. FRAUD — SILENT FRAUD.

A plaintiff, in order to maintain an action for silent fraud, must show that the defendant suppressed the truth with the intent to defraud the plaintiff and that the defendant had a legal or equitable duty of disclosure; the plaintiff cannot merely prove that the defendant failed to disclose something, but instead, must show some type of representation by words or actions that was false or misleading

and was intended to deceive; in order for the suppression of information to constitute silent fraud, there must exist a legal or equitable duty of disclosure.

8. CONTRACTS — PAROL EVIDENCE — MERGER CLAUSES.

Parol evidence of contract negotiations or of prior or contemporaneous agreements that contradict or vary a written contract is not admissible to vary the terms of a clear and unambiguous contract; parol evidence is not admissible to determine whether a contract was merged when the contract contains an explicit merger clause.

9. FRAUD — CONTRACTS — PAROL EVIDENCE — MERGER CLAUSES.

Fraud makes a contract voidable at the instance of the innocent party; parol evidence may be admissible to demonstrate fraud; fraud that relates solely to an oral agreement that was nullified by a valid merger clause in a contract has no effect on the validity of the contract; the only type of fraud that will vitiate a contract when the contract contains a valid merger clause is fraud that would invalidate the merger clause itself, i.e., fraud relating to the merger clause or fraud that invalidates the entire contract including the merger clause.

*Garratt & Bachand, PC* (by *C. William Garratt* and *Lauren B. Tritt*), for Anthony L. Barclae, CYNBA International, Inc., and Robot Defined, LLC.

*Bodman PLC* (by *Robert G. Brower*, *Jeffrey G. Raphelson*, and *Jonathan A. Young*) for *Ernest M. Zarb*.

Before: BORRELLO, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM. Plaintiffs, Anthony L. Barclae, CYNBA International, Inc., and Robot Defined, LLC, appeal as of right an order granting summary disposition in favor of defendant, Ernest Zarb. We affirm.

## I. BASIC FACTS AND PROCEDURAL HISTORY

Some basic facts of this case were set forth in a prior appeal:

> According to plaintiffs, Robot Printing, Inc., and Robot Properties, L.L.C., were businesses that needed working capital in 2007, but their assets were collateral for Comerica Bank loans. Further according to plaintiffs, Zarb (a senior vice president for Comerica Bank) made fraudulent misrepresentations to plaintiffs in April 2007 to induce them "to advance hundreds of thousands of dollars" for these assets to, and for the benefit of, Robot Printing, Inc., Robot Properties, L.L.C., and Comerica Bank. In return for the advance, plaintiffs expected to collect Robot Printing, Inc.'s receivables after April 17, 2007.
>
> After the allegedly fraudulent misrepresentations by Zarb were made, on May 4, 2007, Robot Defined and Comerica Bank entered into a debt purchase agreement. According to the agreement, Robot Defined agreed to purchase outstanding loans made by Comerica Bank to Robot Printing Inc. and Robot Properties, L.L.C. The outstanding principal on the loan notes exceeded $7,000,000.00. The purchase price was the amount outstanding on the notes, less $800,000 (and certain fees). On the same day, a forbearance agreement was executed. In that agreement, Comerica Bank agreed to "forbear from taking action" in regard to defaults on the loans at issue in the debt purchase agreement. [*Barclae v Zarb*, unpublished opinion per curiam of the Court of Appeals, issued January 18, 2011 (Docket No. 289878), p 1.][1]

While the appeal was pending, plaintiffs filed a second amended complaint. The second amended complaint refers to the "Robocolor Process"—an intangible property "involving a potentially patentable printing process of substantial commercial value that was not available to Robot Printing's competitors." The second amended complaint alleged that Robot Printing sold the Robocolor Process in order to reduce the debt

[1] This Court ultimately concluded that, because Zarb was not a signatory of the documents as an individual, he could not take advantage of the jury-waiver provisions. Therefore, this Court ordered that plaintiffs' demand for a jury trial be reinstated. *Barclae*, unpub op at 4-5.

owed to Comerica and to procure working capital, an act that clearly benefitted Comerica. When plaintiffs were presented with the opportunity to purchase some of Robot Printing's assets in March 2007, they were unaware that the Robocolor Process had been sold and was no longer an asset. Plaintiffs alleged that, in spite of Comerica's knowledge of the sale, Zarb represented that plaintiffs could purchase Robot Printing's assets "including without limitation the Robocolor Process (whether by taking possession of the collateral and selling it as a secured creditor or by consenting to Robot's sale of the assets and applying sales proceeds to Robots' debt to Bank)." In addition, although plaintiffs had hoped to purchase Robot Printing's assets, Comerica demanded that plaintiffs "purchase all of Bank's rights against Robot and their guarantors for additional millions of dollars," effectively converting an "asset sale" into a "debt sale."

In the meantime, Comerica filed a suit against Robot Defined, alleging breach of contract and seeking indemnification for losses arising out of Robot Defined's failure to consummate the debt sale agreement. Robot Defined counterclaimed for the loss of money it advanced to Robot Printing as a result of Comerica's fraud. Robot Defined alleged in its first amended counterclaim that "[t]hroughout April 2007, Bank made a series of misrepresentations that Bank had the present intent and ability to cause the sale of certain assets of Robot [Printing], including without limitation the Robocolor Process (whether by taking possession of the collateral and selling it as a secured creditor or by consenting to Robot's sale of the assets and applying sales proceeds to Robot's debt to Bank)." Robot Defined further alleged that the bank wrongfully retained Robot Printing's receivables generated after April 17, 2007, which should have been applied to Robot Defined's

working capital. Robot Defined alleged breach of contract, fraud, conversion, and unjust enrichment. It also alleged that Comerica had retained Robot Defined's $500,000 nonrefundable deposit and that the bank had, therefore, elected its remedy against Robot Defined and could not seek indemnification. The trial court consolidated the two cases, retaining the title and docket number of the action brought by Barclae.

Zarb moved for summary disposition on plaintiffs' claims, arguing that the statute of frauds, MCL 566.132, precluded plaintiffs from bringing an action for breach of alleged oral representations regarding financial accommodations. Zarb argued that, as an employee of Comerica, he was protected under the statute by basic agency principles. Additionally, Zarb argued that neither Barclae nor CYNBA had standing to bring the action because they were mere investors in Robot Defined, and Robot Defined was the only plaintiff who was a party to the debt sales agreement. Further, because of the merger clause in the parties' agreement, Robot Defined was also barred from bringing its claims regarding prior oral promises.

Comerica moved for partial summary disposition with regard to the majority of Robot Defined's counterclaims. Citing MCL 566.132, the statute of frauds, Comerica argued that Robot Defined was in no position to seek enforcement of any alleged oral agreements. Contrary to plaintiffs' contentions, the handwritten notes taken by Zarb at one of the meetings during the negotiation process did not establish a contract for purposes of circumventing the statute of frauds. Additionally, Comerica argued that the merger clause in the debt sale agreement barred evidence of any other agreement. Comerica also argued that there could be no claim for conversion because Robot Defined failed to

allege that the bank had an obligation to return "specific money." Comerica also pointed out that, pursuant to the debt sales agreement, Robot Defined had disclaimed any reliance on any statements or representations made by the bank's employees. Comerica argued that it was not unjustly enriched because there was no evidence that Robot Defined's investment increased the liquidation value of Robot Printing's assets. Finally, Comerica maintained that the language of the parties' agreement did not show an intention to limit Comerica's damages to the nonrefundable deposit; instead, the $500,000 deposit was forfeited as a penalty.

Plaintiffs filed separate responses opposing both Zarb's motion for summary disposition and Comerica's motion for partial summary disposition. Plaintiffs pointed out that when a debtor like Robot Printing defaults on a debt, a bank would generally either sell its debt instruments or conduct an "Article 9 sale" of collateral. Robot Printing needed working capital during the economic downturn, so with Comerica's encouragement, Robot Printing sold its Robocolor Process to a nonparty, RoboColor, L.L.C. With the sale, Robot Printing was able to stay in business and generate new receivables, to the benefit of Comerica. Plaintiffs hoped to purchase the Robocolor Process in an Article 9 sale. At the time, plaintiffs had no idea that the process had already been sold, yet Zarb made a series of statements that the bank was in a position to sell Robot Printing's assets. Zarb even generated a "present agreement" at the parties April 20, 2007, meeting, but then later did an "about face" and refused to proceed with the sale until plaintiffs agreed to purchase the debt instruments. Plaintiffs were put in a position whereby they would lose the many thousands of dollars already invested in Robot Printing to keep it "afloat" if they did not sign the agreement on Zarb's terms. However, Zarb

knew that the Robocolor Process had been sold months earlier at the bank's request and for its benefit. "So, in this action, Plaintiffs seek damages from Zarb, not the Bank, for his fraudulent misrepresentations (admittedly beyond his authority as a Bank officer) about the intent and ability to sell Printing assets (not the Bank's debt instruments)."

Plaintiffs argued that, contrary to Zarb's assertion, plaintiffs had standing to bring the lawsuit. Plaintiffs alleged that Anthony Barclae and CYNBA were not merely investors of Robot Defined; rather, they directly advanced over $1 million to Robot Printing and its creditors and were directly damaged by Zarb's deceit.

Plaintiffs also denied that their claims were barred by MCL 566.132. Plaintiffs were not seeking to enforce any agreement; instead, they sought damages for money advanced to Robot Printing before the May 4, 2007, agreement was executed. Additionally, the statute applies only to the "financial accommodations" relating to loans and extensions of credit. Zarb was not a "financial institution" or "affiliate" within the meaning of the statute. To the extent the statute might apply, plaintiffs argued that Zarb's April 20, 2007, "present agreement" satisfied the writing requirement of the statute.

Finally, plaintiffs argued that the merger clause in the parties' agreement did not bar plaintiffs' claims because the merger clause only referred to prior agreements or understandings with respect to the *debt* sale and does not mention prior agreements relating to the sale of Robot Printing's *assets*. Even if the merger clause applied, the bank's fraudulent conduct vitiated the agreement. Further, neither Barclae nor CYNBA were parties to the contract and the merger clause is not binding on them.

The trial court granted the motions, holding:

> And in reviewing the -- reviewing the statute [and] the case law, it's this court's opinion that -- that this statute is applicable in this case.
>
> And that -- that this was a financial accommodation. That Mr. Zarb was an affiliate of the bank.
>
> And, therefore, I'm going to grant the motion for summary disposition as to Mr. Zarb. Since the contract was not in writing.
>
> It was purported to be in writing. There was some kind of -- some figures that were jotted down during some discussion that was -- had the -- had the printed name of Mr. Zarb in the upper right hand corner, I think it was his first name only.
>
> And it was purported that that may have been sufficient to satisfy the statute of frauds.
>
> However, it's this court's conclusion that that does not. It's simply notes pursuant to negotiations.
>
> If it doesn't satisfy the elements of the contract, it's not signed and, therefore, I'm going to grant the motion.
>
> *Mr*. [C. William] *Garratt* [counsel for plaintiffs]: So is it your Honor's ruling that each and every cause of action against Mr. Zarb is dismissed or merely those that sound, in essence, in contract?
>
> *The Court*: Well, it appears -- it -- each and every one. Each and every one. And similarly with the bank, pursuant to the same statute.
>
> *Mr*. [Robert] *Brower* [counsel for Zarb and Comerica]: That would be on the counter-claim against the bank.
>
> *The Court*: Right.
>
> *Mr. Brower*: I understand the court's ruling.
>
> *Mr. Garratt*: So every claim -- every claim, no matter how it sounds --
>
> *The Court*: (Interposing) Right.

*Mr. Garratt*: -- under whatever theory against the bank by Robot Defined is dismissed?

*The Court*: Right.

The only issue remaining in the consolidated cases was Comerica's indemnity claim against Robot Defined. The trial court entered an order dismissing plaintiffs' claims against Zarb and counterclaims against Comerica on August 12, 2010. Plaintiffs now appeal as of right.

## II. STANDARDS OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). We must review a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

We also review de novo matters of statutory interpretation. *Stanton v Battle Creek*, 466 Mich 611, 614; 647 NW2d 508 (2002). The goal of statutory interpretation is to discern and give effect to the intent of the Legislature. *Odom v Wayne Co*, 482 Mich 459, 467; 760 NW2d 217 (2008). To that end, the first step in determining legislative intent is the language of the statute. *Id*. If the statutory language is unambiguous, then the Leg-

islature's intent is clear and judicial construction is neither necessary nor permitted. *Id*.

Finally, the question of standing is a question of law that we review de novo on appeal. *Young v Indep Bank*, 294 Mich App 141, 143; 818 NW2d 406 (2011).

### III. STATUTE OF FRAUDS

Plaintiffs first argue that the trial court erred by applying MCL 566.132 to their claims. We disagree.

The statute of frauds, MCL 566.132, provides, in relevant part:

> (2) An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution:
>
> (a) A promise or commitment to lend money, grant or extend credit, or make any other financial accommodation.
>
> (b) A promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation.
>
> (c) A promise or commitment to waive a provision of a loan, extension of credit, or other financial accommodation.
>
> (3) As used in subsection (2), "financial institution" means a state or national chartered bank, a state or federal chartered savings bank or savings and loan association, a state or federal chartered credit union, a person licensed or registered under the mortgage brokers, lenders, and servicers licensing act, Act No. 173 of the Public Acts of 1987, being sections 445.1651 to 445.1683 of the Michigan Compiled Laws, or Act No. 125 of the Public Acts of 1981, being sections 493.51 to 493.81 of the Michigan Compiled Laws, or an affiliate or subsidiary thereof.

"[T]he role of the judiciary is to apply the statute of frauds as written, without second-guessing the wisdom

of the Legislature." *Crown Technology Park v D&N Bank, FSB*, 242 Mich App 538, 548 n 4; 619 NW2d 66 (2000). The language of the statute is unambiguous. "It plainly states that a party is precluded from bringing a claim—no matter its label—against a financial institution to enforce the terms of an oral promise to waive a loan provision." *Id*. at 550 (concluding that promissory estoppel actions are barred under the statute). "[T]he Legislature used the broadest possible language . . . to protect financial institutions by not specifying the types of 'actions' it prohibits, eliminating the possibility of creative pleading to avoid the ban." *Id*. at 551.

A. WAS THERE A FINANCIAL ACCOMMODATION?

Plaintiffs argue that there was no "financial accommodation" because Comerica did not "advance funds at a risk of loss."

"Financial accommodation" is not defined in MCL 566.132(2). This Court will "give undefined statutory terms their plain and ordinary meanings" and, in doing so, may consult dictionaries. *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). In defining an undefined term, this Court must also consider its placement and purpose in the statutory scheme. *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008). In *FEI Co v Republic Bank*, unpublished opinion per curiam of the Court of Appeals, issued August 10, 2006 (Docket No. 268700), p 2, this Court explained:

> The statute does not define "financial accommodation," but plaintiff admits that it was an "accommodation." According to *Random House Webster's College Dictionary* (1997), "financial" means "of or pertaining to those commonly engaged in dealing with money and credit." An agreement to delay a sheriff's foreclosure sale constitutes

> an accommodation pertaining to those engaged in dealing with money and credit, because a delay in a foreclosure sale is an accommodation that would be made by a lender or creditor. Therefore, an agreement to delay a foreclosure sale is an agreement to make a "financial accommodation" within the scope of MCL 566.132(2)(a).

We recognize that the *FEI* case is unpublished and, therefore, not binding precedent on this Court, MCR 7.215(C)(1); nevertheless, we find it to be both instructive and persuasive and, therefore, adopt its analysis. See *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).

Additionally, in *Williams v Pledged Property II, LLC*, 2012 WL 6200270 (CA 6, 2012), the United States Court of Appeals for the Sixth Circuit rejected the notion that a "financial accommodation" requires that a bank be exposed to a risk of loss in order for the writing requirement to be triggered. *Id*. at 3. Citing *FEI*, the court, *id*., noted that "the Michigan Court of Appeals has clearly interpreted [MCL 566.132(2)] to include promises to delay foreclosure sales, holding that 'an agreement to delay a foreclosure sale is an agreement to make a "financial accommodation." ' "[2]

There was clearly a "financial accommodation" in this case. The bank, through Zarb, agreed that it would not pursue immediate liquidation of Robot Printing's assets, even though Robot Printing had defaulted on its loan obligations. An agreement to temporarily not seize collateral was a financial accommodation that no doubt benefited Robot Printing, but similarly benefited plaintiffs, who were hoping to take over the business and

[2] See also *Tri-Mount/Preserves Bldg Co, Inc v TCF Nat'l Bank*, unpublished opinion per curiam of the Court of Appeals, issued October 4, 2005 (Docket No. 254077), p 3 (MCL 566.132(2) applied where "[t]he sale of the land was intertwined with the extension of credit").

make it a going concern. The fact that Comerica did not place itself at additional risk of exposure is not dispositive.

B. DOES THE APRIL 20 "PRESENT AGREEMENT" SATISFY THE WRITING REQUIREMENT OF MCL 566.132(2)?

Plaintiffs argue that, if the statute of frauds does apply, then the parties' April 20, 2007, "present agreement" satisfies the writing requirement.

"Our Supreme Court has declined to adopt narrow and rigid rules for compliance with the statute of frauds." *Kelly-Stehney & Assoc, Inc v MacDonald's Indus Prod, Inc (On Remand)*, 265 Mich App 105, 111; 693 NW2d 394 (2005). To satisfy the statute of frauds, a writing need not contain all the terms of the agreement to be enforceable, and the writing may be considered with the admitted facts and extrinsic evidence showing the surrounding circumstances. *Id*. at 114. For that reason, a case-by-case approach is necessary—"[s]ome note or memorandum having substantial probative value in establishing the contract must exist; but its sufficiency in attaining the purpose of the statute [of frauds] depends in each case upon the setting in which it is found." *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 368; 320 NW2d 836 (1982) (quotation marks and citation omitted).

> We should always be satisfied with some note or memorandum that is adequate, when considered with the admitted facts, the surrounding circumstances, and all explanatory and corroborative and rebutting evidence, to convince the court that there is no serious possibility of consummating a fraud by enforcement. When the mind of the court has reached such a conviction as that, it neither promotes justice nor lends respect to the statute to refuse enforcement because of informal-

> ity in the memorandum or its incompleteness in detail. [*Kelly-Stehney*, 265 Mich App at 114 (quotation marks, brackets, and citation omitted).]

To satisfy the statute of frauds, the Restatement Second provides that a writing must contain the following elements:

> Unless additional requirements are prescribed by the particular statute, a contract within the Statute of Frauds is enforceable if it is evidenced by any writing, signed by or on behalf of the party to be charged, which
>
> (a) reasonably identifies the subject matter of the contract,
>
> (b) is sufficient to indicate that a contract with respect thereto has been made between the parties or offered by the signer to the other party, and
>
> (c) states with reasonable certainty the essential terms of the unperformed promises in the contract. [1 Restatement Contracts, 2d, § 131, p 334.]

Even taking the evidence in a light most favorable to plaintiffs, the parties' April 20 "agreement" does not meet the signed writing requirement of MCL 566.132. A valid contract requires: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). Here, there was no mutuality of agreement. Although the document refers to the parties' "present agreement," it also includes terms and phrases such as "New Debt Sale," "take this deal," and a number of handwritten items. "ERNIE" is handwritten in the top-right corner of the document. Even if the name satisfied the signing requirement, the document is clearly a reflection of ongoing negotiations and, therefore, the trial court

properly concluded that the document did not satisfy the statute of frauds.

C. CAN ZARB AVAIL HIMSELF OF MCL 566.132(3)?

Plaintiffs argue that Zarb was neither a "financial institution" nor an "affiliate" under the statute. They claim: "If a bank's officer or employee were to be deemed, 'a financial institution' within the meaning of MCL 566.132(3), the Legislature would have included 'officers' or 'employees' in the definition of 'financial institution.' " Additionally, plaintiffs claim that an "affiliate" is limited to those who are affiliates of licensees under the Mortgage Brokers, Lenders, and Servicers Licensing Act, MCL 445.1651 *et seq*. (mortgage brokers, lenders, and servicers).

We conclude that, although the trial court and the parties discussed whether Zarb could be considered an "affiliate" under MCL 566.132(3), such an inquiry was unnecessary. Basic agency principles allow Zarb to assert the statute of frauds defense.

Plaintiffs do not dispute that Comerica is a "financial institution" as defined in MCL 566.132(3). Because a corporation may only act through its officers and agents, an agency relationship exists between a corporation and its officers. *In re Moroun*, 295 Mich App 312, 332; 814 NW2d 319 (2012). Anthony Barclae testified that he ascertained whether Zarb "really [could] negotiate this deal." "I assumed that [Zarb] was a representative of Comerica Bank and he was representing Comerica Bank and – not so much himself. He was a bank representative." Barclae acknowledged that Zarb had the authority to bind the bank.

Agency principles were discussed in the prior appeal:

> Next, plaintiffs claim that because Zarb did not sign the debt purchase agreement and forbearance agreement, he cannot invoke the jury trial waivers in the agreements. We agree.
>
> * * *
>
> We conclude that, according to the plain language of the waiver provisions, "each party" agreed to waive any right to trial by jury. In Zarb's answer to plaintiff's [sic] complaint, he admitted that he was not a party to the agreement between Robot Defined and Comerica Bank. To interpret these waivers to apply to Zarb, this Court would be required to rewrite the plain language of the clauses to not only apply to "each party," but also "agents of each party." Such an interpretation would render language referencing the parties and their agents elsewhere in the agreements surplusage.
>
> * * *
>
> Our conclusion with respect to [these] jury trial waivers also corresponds with traditional agency theory. A contract between a principal and a third party is enforceable by the principal against the third party. 3 Am Jur 2d, Corporations, § 313. Only where an agent contracts with the party on behalf of the principal, but in the agent's own name "or in such manner as to make it the agent's personal contract," can the agent sue in his own name to enforce the contract. Here, Comerica Bank could invoke the jury trial waiver, but because Zarb did not sign the agreements as an individual or make the agreements his own personal contracts, Zarb cannot invoke the jury trial waiver as an individual. Thus, the trial court erred when it granted Zarb's motion to strike plaintiffs' jury trial demand. [*Barclae*, unpub op at 3-5 (some citations omitted).]

Because of this Court's prior decision, it is the law of the case that Zarb was acting as an agent of Comerica during the parties' negotiations.

> Under the law of the case doctrine, if an appellate court resolves a legal issue and remands to the trial court for further proceedings, the legal question determined by the appellate court will not be decided differently in a subsequent appeal in the same case if the facts remain materially the same. Stated another way, the doctrine is applied when the prior appeal involves the same set of facts, the same parties, and the same question of law . . . . [*In re Petition by Wayne Co Treasurer*, 265 Mich App 285, 297; 698 NW2d 879 (2005) (quotation marks and citations omitted).]

Although the issue in the prior appeal related to a jury waiver in the parties' agreement, the same legal question was involved—that being Zarb's status as an agent of Comerica. There is no question that Zarb was acting on Comerica's behalf when negotiating with plaintiffs. Plaintiffs also admit the agency relationship. They must, because Robot Defined's numerous counterclaims against Comerica are founded on such agency principles.

Plaintiffs argue that MCL 566.132(3) does not specifically include an "employee" of a financial institution and, therefore, Zarb cannot avail himself of the statute of frauds defense. We disagree. A financial institution can only act through its agents, principals, and employees. If agents and employees of a financial institution were not included within the statute, then it would render that portion of the statute useless. This Court must avoid interpreting statutes in a manner that would render any part of the statute nugatory. *Robinson v City of Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010). If employees of financial institutions were not protected, the statute of frauds could be easily circumvented merely by suing employees of a financial institution. Given that Zarb was an agent for Comerica at the time of the parties' negotiations, he may avail himself of the defense of the statute of frauds.

D. DOES PART PERFORMANCE PRECLUDE APPLICATION OF MCL 566.132?

Finally, plaintiffs argue that, if the statute of frauds applies, it was rendered inapplicable because of part performance. Plaintiffs maintain that they relied on Zarb's fraudulent statements and "paid him hundreds of thousands of dollars to and for [Robot] Printing and for Comerica's benefit."

> If one party to an oral contract, in reliance upon the contract, has performed his obligation thereunder so that it would be a fraud upon him to allow the other party to repudiate the contract, by interposing the statute, equity will regard the contract as removed from the operation of the statute. The contract to be enforced must be established by clear and convincing evidence. [*Guzorek v Williams*, 300 Mich 633, 638-639; 2 NW2d 796 (1942) (citations omitted).][3]

Plaintiffs never performed any aspect of the alleged agreement; instead, plaintiffs voluntarily infused Robot Printing with cash at their own peril. They were under no obligation to do so. The record "discloses merely that plaintiff did some things which were preliminary to the performance or execution of the contract, not that he did them in performance of the contract . . . . [T]he acts which plaintiff now attempts to assert were partial performance of the contract, were nothing more than activities preliminary to any performance or partial performance under the contract itself." *Cassidy v Kraft-Phenix Cheese Corp*, 285 Mich 426, 432-433; 280 NW 814 (1938). Because plaintiffs can cite no provision of the "agreement" that they performed, their claim of partial performance must fail.

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[3] The doctrine of partial performance applies primarily in actions involving land. *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 540; 473 NW2d 652 (1991).

IV. PLAINTIFFS' FRAUD CLAIM AGAINST ZARB

Although the trial court did not address the issue, plaintiffs argue that they properly alleged a fraud claim. Plaintiffs argue that: (1) Zarb made fraudulent misrepresentations that he had the present ability to sell Robot Printing's assets, (2) the statements were made in bad faith, (3) Zarb knew they were false and intended that plaintiffs rely on the statements, and (4) plaintiffs did, in fact, rely on the statements and advanced money to Robot Printing to their detriment. We disagree.

There are three interrelated fraud doctrines: (1) fraudulent misrepresentation, (2) innocent misrepresentation, and (3) silent fraud. *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012). Plaintiffs allege that, separate and apart from the parties' written and oral agreements, Zarb's fraudulent claims caused them to continuously infuse Robot Printing with operating funds.

> Common-law fraud or fraudulent misrepresentation entails a defendant making a false representation of material fact with the intention that the plaintiff would rely on it, the defendant either knowing at the time that the representation was false or making it with reckless disregard for its accuracy, and the plaintiff actually relying on the representation and suffering damage as a result. Silent fraud is essentially the same except that it is based on a defendant suppressing a material fact that he or she was legally obligated to disclose, rather than making an affirmative misrepresentation. Such a duty may arise by law or by equity; an example of the latter is a buyer making a direct inquiry or expressing a particularized concern. A misleadingly incomplete response to an inquiry can constitute silent fraud. A claim for negligent misrepresentation requires plaintiff to prove that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care.

> Silent fraud and negligent misrepresentation both require a defendant to owe a duty to the plaintiff. Defendants rely on this Court's explanation in *McMullen v Joldersma*, 174 Mich App 207, 212; 435 NW2d 428 (1988), that Michigan jurisprudence had never imposed on sellers' agents a duty per se of disclosure to buyers, in contrast to the duty it has imposed on sellers themselves. However, a duty of disclosure may be imposed on a seller's agent to disclose newly acquired information that is recognized by the agent as rendering a prior affirmative statement untrue or misleading. This is especially true when the agent knows that the buyer has a particular concern with the subject matter of that statement. Indeed, a duty to disclose may arise solely because the buyers express a particularized concern or directly inquire of the seller . . . . [*Alfieri v Bertorelli*, 295 Mich App 189, 193-194; 813 NW2d 772 (2012) (quotation marks and citations omitted).]

Even though plaintiffs couch their claims in terms of "fraudulent misrepresentation," their real claim is for silent fraud. They do not argue that Zarb made affirmative statements regarding the Robocolor Process; instead, they argue that Zarb remained silent on the issue and failed to disclose that the patented process had been sold. In order to maintain an action for silent fraud, "the plaintiff must show that the defendant suppressed the truth with the intent to defraud the plaintiff and that the defendant had a legal or equitable duty of disclosure. A plaintiff cannot merely prove that the defendant failed to disclose something; instead, a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive." *Lucas v Awaad*, 299 Mich App 345, 363-364; 830 NW2d 141 (2013) (quotation marks and citations omitted). Thus, "[w]hile duty is irrelevant in a fraud claim, it is relevant in a silent fraud claim" and "in order for the suppression of information to constitute silent fraud there must exist a legal or

equitable duty of disclosure." *Id*. at 364 (quotation marks and citations omitted).

Plaintiffs' silent fraud claim must fail for two reasons: they cannot prove that Zarb owed them a duty to reveal the information nor can they demonstrate that Zarb's failure to disclose was calculated to defraud plaintiffs. Taking the deposition testimony in a light most favorable to plaintiffs, Zarb acknowledged that he was aware that the patented process was important to plaintiffs because plaintiffs believed that the process would generate substantial profits for Robot Printing. That the process was owned by an affiliate of Robot Printing did not keep Robot Printing from utilizing the technology and profiting from it. Additionally, as Zarb testified, the bank held an all-asset security interest in Robot Printing, including its intangibles. There is nothing in the record that would indicate that the bank discharged the collateral.

Additionally, plaintiffs cannot demonstrate that their "damages" were the result of the alleged fraud. Before they even met Zarb, plaintiffs had infused Robot Printing with over $150,000 in operating capital. Plaintiffs entered into a debt sale contract that required them to purchase accounts receivable that they could not subsequently finance. Their deposition testimony focused on the issue of accounts receivable and whether the bank properly applied Robot Printing's post-April 17 receivables to Robot Defined's operating capital. At no time during Anthony Barclae's or Peter Barclae's deposition do they take issue with "losing" the Robocolor Process. Thus, even if the patented process itself was owned by another company (which was affiliated with Robot Printing), there is no indication from the record that plaintiffs' decision to continuously fund Robot Printing had anything whatsoever to do with the al-

leged fraud. "In a fraud and misrepresentation action, the tortfeasor is liable for injuries resulting from his wrongful act, whether foreseeable or not, provided that the damages are the legal and natural consequences of the wrongful act and might reasonably have been anticipated." *Phinney v Perlmutter*, 222 Mich App 513, 532; 564 NW2d 532 (1997).

V. THE MERGER CLAUSE

Plaintiffs argue that the merger clause in the parties' May 4, 2007, debt sale agreement was inapplicable to Zarb, who was not a party to the contract. Additionally plaintiffs argue that the merger clause was void because they were fraudulently induced into entering into the contract.

Paragraph 13 of the parties' May 4, 2007, debt sale agreement provided, in relevant part:

> This Agreement sets forth the entire agreement and understanding of the parties, and supersedes all prior agreements and understandings between the parties with respect to the assignment.

The May 4, 2007, agreement also provided:

> Assignee [Robot Defined] (i) has such knowledge and experience in financial matters that it is capable for evaluating the merits and risks of the purchase of the Notes and other Loan Documents; (ii) is knowledgeable regarding the financial status of Borrower, the Transferred Documents and all of Borrower's assets; (iii) has agreed to purchase the Notes and Assignor's interest in the Transferred Documents on the basis of its own independent investigation, evaluation and credit determination and has not sought or relied upon any representation or warranty from Assignor (except those representations expressly stated in Section 5 of this Agreement) or information provided by or statements made by Assignor or its representatives; and (iv) is

> purchasing the Notes for Assignee's own account and not with a view to, or for sale in connection with, any public distribution which would violate applicable securities laws.

" 'Parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous.' " *UAW-GM Human Resources Ctr v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998), quoting *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 580; 458 NW2d 659 (1990). When a contract contains "an explicit integration clause" parol evidence is inadmissible to determine whether the contract was integrated. *UAW-GM*, 228 Mich App at 494.

However, plaintiffs do not argue that there is a conflict over the terms of a valid contract; rather, plaintiffs argue that there is no legal contract because it was fraudulently obtained. " 'Fraud . . . makes a contract voidable at the instance of the innocent party' " and parol evidence may be admissible to demonstrate fraud. *Id*. at 503, quoting 3 Corbin, Contracts, § 580, p 431. Nevertheless, where there is a valid merger clause "only certain types of fraud would vitiate the contract." *Id*.

> [W]hile parol evidence is generally admissible to prove fraud, fraud that relates solely to an oral agreement that was nullified by a valid merger clause would have no effect on the validity of the contract. Thus, when a contract contains a valid merger clause, the only fraud that could vitiate the contract is fraud that would invalidate the merger clause itself, i.e., fraud relating to the merger clause or fraud that invalidates the entire contract including the merger clause. [*Id*.]

"Fraud in the procurement of the contract may be . . . grounds to retroactively avoid contractual obligations

through traditional legal and equitable remedies such as cancellation, rescission, or reformation . . . ." *Titan Ins*, 491 Mich at 557-558.

> There is an important distinction between (a) representations of fact made by one party to another to induce that party to enter into a contract, and (b) collateral agreements or understandings between two parties that are not expressed in a written contract. It is only the latter that are eviscerated by a merger clause, even if such were the product of misrepresentation. It stretches the *UAW-GM* ruling too far to say that any pre-contractual factual misrepresentations made by a party to a contract are wiped away by simply including a merger clause in the final contract. Such a holding would provide protection for disreputable parties who knowingly submit false accountings, doctored credentials and/or already encumbered properties as security to unknowing parties as long as they were savvy enough to include a merger clause in their contracts. In fact, the *UAW-GM* court considered the effect of fraud allegations on a contract with a merger clause and determined that evidence was admissible to prove fraud that would "invalidate the merger clause itself, i.e., fraud relating to the merger clause or fraud that invalidates the entire contract including the merger clause. 3 Corbin, Contracts, § 578." [*UAW-GM*, 228 Mich App] at 503. Further, the section of *Corbin On Contracts* cited by *UAW-GM*, § 578, states that a merger clause "even though it is contained in a complete and accurate integration does not prevent proof of fraudulent misrepresentations by a party to the contract, or of illegality, accident or mistake." 6 Corbin, Contracts, § 578, p. 114 (reprinted as published in the 1960 edition of Volume 3). *Corbin* goes on to explain[:]
>
> "Fraud in the inducement of assent . . . may make the contract voidable without . . . showing that the writing was not agreed on as a complete integration of its terms. In such case the offered testimony may not vary or contradict the terms of the writing, although it would be admissible even if it did so; it merely proves the existence of collateral factors that have a legal operation of their own, one that

> prevents the written contract from having the full legal operation that it would otherwise have had. This is not varying or contradicting the written terms of agreement, although it does vary or nullify in part their legal effect." 3 Corbin, Contracts § 580, p. 142 (emphasis added).
>
> In sum, the *UAW-GM* court did not bar a fraud claim in all cases in which the underlying contract has a merger clause, the court simply held that in that case the "plaintiff made no allegations of fraud that would invalidate the contract or the merger clause." *Id*. at 505. The question then is, when does fraud invalidate an entire contract, and when is it such that it provides no remedy or recourse if there is a written contract with a merger clause?
>
> The Restatement 2nd of Contracts explains that if, "a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient." REST. 2D CONTR. § 164. The answer to the question posed is, therefore, fraud will invalidate a contract when a party's assent to said contract is induced through *justified* reliance upon a fraudulent misrepresentation. A merger clause can render reliance unjustified as to agreements, promises or understandings related to performances that are not included in the written agreement. [*Star Ins Co v United Commercial Ins Agency, Inc*, 392 F Supp 2d 927, 928-929 (ED Mich, 2005) (some emphasis omitted).]

Plaintiffs allege that, although Zarb realized that they were particularly interested in the Robocolor Process, Zarb failed to inform plaintiffs that the process had been sold. They argue that the debt sale agreement itself was voidable at their discretion because of Zarb's misrepresentations regarding Robot Printing's assets. Because plaintiffs do not seek to add to or vary the terms of the May 4 contract, parol evidence may be introduced to show that plaintiffs were fraudulently induced into signing the agreement. However, as previously discussed, plaintiffs' claim will still fail. Thus,

while it appears that the merger clause may not stand as a bar to plaintiffs' claim, plaintiffs' claim fails for other reasons.

### VI. DO ANTHONY BARCLAE AND CYNBA HAVE STANDING TO BRING THEIR CLAIM?

Although not addressed by the trial court, plaintiffs argue that, contrary to Zarb's assertions, their claim was not merely derivative of Robot Defined's claim.

"To have standing, a party must have a legally protected interest that is in jeopardy of being adversely affected." *Dep't of Treasury v Comerica Bank*, 201 Mich App 318, 329–330; 506 NW2d 283 (1993). A plaintiff must have "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large . . . ." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). "A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Fieger v Comm'r of Ins*, 174 Mich App 467, 471; 437 NW2d 271 (1988).

> MCR 2.201(B) requires that, generally, an action must be prosecuted in the name of the real party in interest. A real party in interest is the one who is vested with the right of action on a given claim, although the beneficial interest may be in another. This standing doctrine recognizes that litigation should be begun only by a party having an interest that will assure sincere and vigorous advocacy. In addition, the doctrine protects a defendant from multiple lawsuits for the same cause of action. A defendant is not harmed provided the final judgment is a full, final, and conclusive adjudication of the rights in controversy that may be pleaded to bar any further suit instituted by any other party. [*City of Kalamazoo v Richland Twp*, 221 Mich App 531, 534; 562 NW2d 237 (1997) (citations omitted).]

In cases involving corporations, the "doctrine of standing provides that a suit to enforce corporate rights or to redress or prevent injury to a corporation, whether arising from contract or tort, ordinarily must be brought in the name of the corporation, and not that of a stockholder, officer, or employee." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 474; 666 NW2d 271 (2003).

Here, plaintiffs pleaded fraudulent misrepresentation against Zarb on the basis of Zarb's failure to inform them that Robot Printing no longer owned the Robocolor Process. As a result of the alleged duplicity, both Anthony Barclae and CYNBA claimed that they loaned money to and infused Robot Printing with operating capital; the allegations indicated a fraud directed at Barclae and CYNBA. The claim is not simply derivative because the alleged wrong was a breach of duty owed personally to these plaintiffs. Although plaintiffs' claims must fail for the reason previously stated, they had standing to bring this cause of action.

## VII. DID THE TRIAL COURT ERR BY DISMISSING ALL OF ROBOT DEFINED'S CLAIMS AGAINST COMERICA?

### A. $500,000 DEPOSIT AS LIQUIDATED DAMAGES

Robot Defined argues that the trial court erred by dismissing its claim against Comerica regarding the return of its $500,000 deposit.

The May 4, 2007, debt sale agreement included the following provision:

> 5. The Purchase Price is payable as follows:
>
> (a) A non-refundable Deposit of $500,000 payable as follows: (i) $250,000 in cash (which Assignor has received); and (ii) a $250,000 promissory note in favor of Assignor, in the form attached, executed by Penske Corporation and delivered to Assignor. The Deposit is non-refundable unless

> Assignor refuses to close. If Assignee breaches this Agreement, Assignor may retain the Deposit as liquidated damages.

When interpreting a contract, a court's obligation is to determine the intent of the contracting parties. *Woodbury v Res-Care Premier, Inc*, 295 Mich App 232, 244; 814 NW2d 308 (2012). If the language of the contract is unambiguous, the court must construe and enforce the contract as written. *Id*.

"A contractual provision for liquidated damages is nothing more than an agreement by the parties fixing the amount of damages in the case of a breach of that contract." *Papo v Aglo Restaurants of San Jose, Inc*, 149 Mich App 285, 294; 386 NW2d 177 (1986).

> It is a well-settled rule in this State that the parties to a contract can agree and stipulate in advance as to the amount to be paid in compensation for loss or injury which may result in the event of a breach of the agreement. Such a stipulation is enforceable, particularly where the damages which would result from a breach are uncertain and difficult to ascertain at [the] time [the] contract is executed. If the amount stipulated is reasonable with relation to the possible injury suffered, the courts will sustain such a stipulation. [*Moore v St Clair Co*, 120 Mich App 335, 340; 328 NW2d 47 (1982) (quotation marks and citation omitted).]

The validity of a liquidated damages clause depends on the conditions existing when the contract was signed rather than at the time of the breach. *EF Solomon v Dep't of State Hwys & Transp*, 131 Mich App 479, 484; 345 NW2d 717 (1984).

Here, the parties agreed that, if Robot Defined failed to comply with the agreement, it would essentially forfeit the $500,000 deposit and the bank could retain the deposit as liquidated damages. Robot Defined ar-

gues that the "election of remedies" doctrine barred the bank from asserting a claim against it for indemnification.

The election of remedies doctrine is a "procedural rule which precludes one to whom there are available two inconsistent remedies from pursuing both." *Riverview Coop, Inc v First Nat'l Bank & Trust Co of Mich*, 417 Mich 307, 311; 337 NW2d 225 (1983). The purpose of the doctrine "is not to prevent recourse to alternate remedies, but to prevent double redress for a single injury." *Id*. at 312. "In order for the doctrine to apply, three prerequisites must exist: (1) at the time of the election, there must have been two or more remedies available; (2) the alternative remedies must be inconsistent rather than consistent and cumulative; and (3) the party must have chosen and pursued one remedy to the exclusion of the other(s)." *Prod Finishing Corp v Shields*, 158 Mich App 479, 494; 405 NW2d 171 (1987). A plaintiff may, however, simultaneously pursue all available remedies regardless of their legal consistency, if the plaintiff does not obtain a double recovery. *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 92; 443 NW2d 451 (1989).

> "For one proceeding to be a bar to another for inconsistency, the remedies must proceed from opposite and irreconcilable claims of right and must be so inconsistent that a party could not logically assume to follow one without renouncing the other. Two modes of redress are inconsistent if the assertion of one involves the negation or repudiation of the other. In this sense, inconsistency may arise either because one remedy must allege as fact what the other denies, or because the theory of one must necessarily be repugnant to the other. More particularly, where the election of a remedy assumes the existence of a particular status or relation of the party to the subject matter of litigation, another remedy is inconsistent if, in order to seek it, the party must assume a different and

> inconsistent status or relation to the subject matter." [*Prod Finishing Corp*, 158 Mich App at 494-495, quoting 25 Am Jur 2d, Election of Remedies, § 11, pp 653–654.]

Robot Defined does not take issue with the liquidated damages provision; it only argues that by retaining the deposit, the bank is foreclosed from seeking further damages. However, as the bank points out, Robot Defined does not have a cause of action in this regard. Robot Defined's "claim" is really a defense to a breach of contract action. Thus, the liquidated damages provision and the bank's failure to tender back the deposit serves Robot Defined as an affirmative defense to a breach of contract action by the bank. Given the permissive language in the provision, Robot Defined might well succeed on such a defense. However, because there was no "cause of action," the trial court did not err by dismissing the count.

### B. BREACH OF CONTRACT WITH REGARD TO RECEIVABLES

Robot Defined next argues that the trial court erred by dismissing its breach of contract counterclaim, arguing that the statute of frauds did not apply because the agreement relating to the accounts receivable was in a written instrument.

The written instrument to which Robot Defined refers was not the parties' May 4, 2007, debt sale agreement; it was the May 4, 2007 forbearance agreement, which provided:

> Borrowers [Robot Printing and its guarantors] acknowledge and agree they shall hold in express trust for Bank and immediately surrender to Bank in the form received all of their cash inflows by depositing such inflows into account _____ maintained at Bank. Proceeds of Accounts generated on or prior to April 16, 2007 shall be applied to reduce permanently the Liabilities. *Provided there is no*

> *default under this Agreement and no default under the Debt Sale Agreement* (defined below), Bank agrees to deposit promptly to Printing's operating account maintained at Bank all proceeds of Accounts generated by Printing after April 16, 2007 and Borrowers may use the proceeds of such Accounts for working capital. In the event customers of Printing owe Accounts generated both prior to and after April 16, 2007, collections from those customers shall be applied first to the pre-April 16, 2007 Accounts (and applied by Bank to the Liabilities), unless there is a bona fide and fully documented dispute raised by such customer as to the validity of the pre-April 16, 2007 Account, in which case the payment shall be considered on account of post-April 16, 2007 Accounts. . . . At the request of Buyer (defined below) and Borrowers, Bank agrees to subordinate its lien on the post-April 16, 2007 Accounts to a new lender, including [CYNBA] International, Inc., an affiliate of Buyer. [Emphasis added.]

As Comerica points out, the foregoing provision has no application because Robot Defined failed to consummate the debt sale agreement. Thus, Comerica was under no obligation to share the receivables with Robot Defined.

### C. CONVERSION, FRAUD, AND UNJUST ENRICHMENT

As discussed above, Robot Defined's claims for conversion, fraud, and unjust enrichment must fail because Robot Defined seeks to enforce an oral agreement and the statute of frauds precludes such claims.

Affirmed.

BORRELLO, P.J., and K. F. KELLY and GLEICHER, JJ., concurred.

*In re* BURNETT ESTATE

Docket No. 309640. Submitted March 5, 2013, at Lansing. Decided April 16, 2013, at 9:05 a.m.

Beryl Ellen Niles and Joseph Buxbaum brought a divorce action in the Washtenaw Circuit Court, Family Division, as guardians on behalf of their mother, Devon P. Burnett, who was 79 years old and suffering from dementia. Defendant, Bobbie E. Burnett, moved for summary disposition, arguing that guardians and conservators lack the authority to file a complaint for divorce on behalf of an incapacitated ward. After the court, Darlene A. O'Brien, J., denied the motion, defendant filed a second motion for summary disposition, arguing that because Michigan law only recognizes marriage as a union between one man and one woman, the court did not have jurisdiction to grant a divorce given that defendant, who was born a man, had undergone gender reassignment surgery after the parties were married. Defendant further argued that granting a divorce would be an implicit recognition of marriage between individuals of the same gender, which the Michigan Constitution prohibits. The court denied defendant's motion, concluding that because the marriage contract was valid when the parties entered into it, the court had the ability to dissolve it. The court entered a final judgment of divorce, and defendant appealed.

The Court of Appeals *held*:

1. A guardian or conservator may file a complaint for divorce on behalf of the spouse over whom the guardianship or conservatorship is placed under *Houghton v Keller*, 256 Mich App 336 (2003), which was controlling in this case.

2. The circuit court had jurisdiction to enter a divorce judgment after defendant had undergone gender reassignment surgery because the parties' marriage contract was valid and enforceable under Michigan law at the time it was entered. The court's decision to grant the parties a divorce did not violate the constitutional prohibition on recognizing any agreement other than the union of one man and one woman in marriage as a marriage or similar union. Further, defendant's gender-reassignment surgery did not dissolve the parties' marriage because, once a marriage is validly entered into, one spouse's actions cannot unilaterally

result in its legal dissolution without court involvement. Defendant's situation did not fall within the narrow circumstances under which a marriage can be annulled under Michigan law.

Affirmed.

1. DIVORCE — GUARDIAN AND WARD — CAPACITY TO SUE.

A guardian or conservator may file a complaint for divorce on behalf of the spouse over whom the guardianship or conservatorship is placed (MCR 2.201[E], MCR 3.202[A]).

2. DIVORCE — JURISDICTION — SAME-SEX MARRIAGE — GENDER-REASSIGNMENT SURGERY.

A circuit court has jurisdiction to enter a divorce judgment for a marriage in which one of the spouses has undergone gender-reassignment surgery if the underlying marriage contract was valid and enforceable when it was entered.

3. DIVORCE — CONSTITUTIONAL LAW — SAME-SEX MARRIAGE — GENDER-REASSIGNMENT SURGERY.

A court's decision to enter a divorce judgment for a marriage in which one of the spouses has undergone gender-reassignment surgery does not violate the constitutional prohibition on recognizing any agreement other than the union of one man and one woman in marriage as a marriage or similar union (Const 1963, art 1, § 25).

*Martin E. Blank* and *Anne Argiroff* for plaintiff.

*Raymond G. Mullins* for defendant.

Before: MURRAY, P.J., and MARKEY and WHITBECK, JJ.

MURRAY, P.J.

## I. INTRODUCTION

The United States Constitution created a federal government of limited, enumerated powers, and reserved[1] to the states all powers not specifically granted

[1] Because the states held all the power prior to creation of the Constitution, and it was the states that consented to the establish-

to the federal government. See US Const, art I, § 8; US Const, Am X. As eloquently stated by the principal architect of the Constitution when arguing for its ratification by the states, "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45, p 311 (James Madison).

In the exercise of its reserved powers, Michigan has always regulated the marriage relationship.[2] This case involves both the definition of marriage established by the people through a direct vote as set forth in our state constitution (Const 1963, art 1, § 25), as well as by the people's representatives as contained in statute (MCL 551.1). These laws (and others) prohibit recognition of a contract of marriage entered into by two individuals of the same sex. Here, defendant—who had a sex-change operation subsequent to the parties'

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ment of a federal government for certain limited purposes, the states *retained*, as opposed to being *granted*, all powers not expressly given to the federal government. See *Chisholm v Georgia*, 2 US (2 Dall) 419, 435; 1 L Ed 440 (1793) ("Every state in the Union, in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of government actually surrendered: each state in the Union is sovereign, as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the states have surrendered to them[.]") and *United States v Lopez*, 514 US 549, 584; 115 S Ct 1624; 131 L Ed 2d 626 (1995) (Thomas, J., concurring).

[2] The marriage relationship, there can be no doubt, has always been exclusively within the power of the states to define and regulate. See *Andrews v Andrews*, 188 US 14, 32; 23 S Ct 237; 47 L Ed 366 (1903), abrogated on other grounds *Sherrer v Sherrer*, 334 US 343, 353; 68 S Ct 1087; 92 L Ed 1429 (1948); *Trustees of Dartmouth College v Woodward*, 17 US (4 Wheat) 518, 600-601; 4 L Ed 629 (1819).

marriage—argues that under these provisions a Michigan court had no jurisdiction to grant a divorce to the plaintiff because defendant is also now a female. For the reasons that follow, we hold that the circuit court had jurisdiction to enter the divorce judgment, and we therefore affirm.

## II. FACTS AND PROCEEDINGS

Plaintiff and defendant were married in Ann Arbor, Michigan on August 30, 1984. In the late 1980s, plaintiff and defendant moved to Philadelphia, Pennsylvania, where they lived together until September 2005. During that month defendant drove plaintiff to Michigan for an extended visit with her daughter, Beryl Ellen Niles. Plaintiff never returned to Philadelphia, and never lived again with defendant.

The underlying divorce action was initiated by plaintiff's children, Niles and her brother Joseph Buxbaum, who also served as plaintiff's guardians.[3] Plaintiff was 79 years old and suffering from dementia when the complaint was filed on her behalf. Defendant responded to the complaint and filed a motion for summary disposition, arguing that guardians and conservators lack authority to file a complaint for divorce on behalf of an incapacitated ward. The trial court denied defendant's motion from the bench, concluding that under Michigan caselaw guardians and conservators have authority to file a complaint for divorce.

Defendant subsequently filed a second motion for summary disposition, this time arguing that the trial court did not have jurisdiction to grant a divorce. The basis for defendant's argument was that defendant, who was born a man, underwent gender reassign-

[3] Niles was also appointed plaintiff's conservator.

ment surgery to become a woman in November 2003. As a result, defendant argued, the parties were no longer married because Michigan law only recognized marriage as the union between one man and one woman. And, defendant argued, because the parties were not married the trial court had no jurisdiction to grant a divorce. Defendant further argued that granting a divorce would be an implicit recognition of marriage between individuals of the same gender, which is prohibited under the Michigan Constitution.

The trial court denied defendant's motion, concluding that the parties entered into a valid marriage contract, not a same-sex marriage contract, and that it had the ability to dissolve a marriage that was lawfully entered into in this state. Soon thereafter the court entered a final judgment of divorce, from which defendant now appeals.[4]

## III. ANALYSIS

Defendant raises two issues. First, can a guardian or conservator file a complaint for divorce on behalf of the spouse over whom the guardianship or conservatorship is placed? Second, if the complaint was properly filed, did the circuit court have jurisdiction to enter a judgment of divorce between married persons purportedly of the same sex? We address these issues in that order below, and ultimately decide both questions in the affirmative.

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[4] Plaintiff died during the pendency of this appeal. Niles, as personal representative of plaintiff's estate, substituted for plaintiff as appellee in this appeal. *Burnett v Burnett*, unpublished order of the Court of Appeals, entered January 2, 2013 (Docket No. 309640). Because plaintiff died after the judgment was entered and an appeal was pending, the case is not moot. See *McCormick v McCormick*, 221 Mich App 672, 678-679; 562 NW2d 504 (1997).

A. POWER TO FILE A DIVORCE COMPLAINT

Defendant's first dispositive motion, which the trial court denied, challenged the ability of a guardian or conservator to file a complaint for divorce on behalf of an incompetent spouse. This Court reviews de novo a trial court's decision on a motion for summary disposition, *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011), and reviews issues of statutory and court rule interpretation under the same standard, *Bint v Doe*, 274 Mich App 232, 234; 732 NW2d 156 (2007).

In *Houghton v Keller*, 256 Mich App 336, 338; 662 NW2d 854 (2003), we addressed this precise issue and concluded that "a guardian can bring an action for divorce on behalf of an incompetent spouse." Defendant acknowledges *Houghton* but argues that *Houghton* is either erroneous or otherwise not conclusive on the merits of the issue presented in this case. Specifically, defendant notes that *Houghton* cited to *Smith v Smith*, 125 Mich App 164; 335 NW2d 657 (1983), which in turn relied on the General Court Rules. Because the General Court Rules have been replaced by the Michigan Court Rules, defendant argues, *Houghton* cannot control the outcome of this case under the Michigan Court Rules.

For at least two reasons, this argument is without merit. First, *Houghton* did not solely rely on *Smith*, as the Court specifically considered the language contained in two Michigan court rules, MCR 3.202(A) and MCR 2.201(E). See *Houghton*, 256 Mich App at 338. Second, although the *Smith* Court relied on GCR 1963, 722.2[5] for its holding, the *Houghton* Court properly

[5] GCR 1963, 722.2 provided: " 'Actions for divorce and separate maintenance by or against incompetent persons shall be brought as provided in sub-rule 201.5.' " *Smith*, 125 Mich App at 166, quoting GCR 1963, 722.2. GCR 1963, 201.5(1) provided: " 'Whenever an infant or incompetent person has a guardian of his estate, actions may be brought and shall

concluded that several rules within subchapter 3.200 requires the same result reached in *Smith*.

Subchapter 3.200 is titled "Domestic Relations Actions," and MCR 3.201(A)(1) provides that subchapter 3.200 applies to actions for divorce, separate maintenance, and the annulment of a marriage. MCR 3.202(A) provides: "Except as provided in subrule (B), minors and incompetent persons may sue and be sued as provided in MCR 2.201." MCR 2.201(E) pertains to minors and incompetent persons and provides in relevant part as follows:

> (1) *Representation.*
>
> (a) If a minor or incompetent person has a conservator, actions may be brought and must be defended by the conservator on behalf of the minor or incompetent person.
>
> (b) If a minor or incompetent person does not have a conservator to represent the person as plaintiff, the court shall appoint a competent and responsible person to appear as next friend on his or her behalf, and the next friend is responsible for the costs of the action.
>
> (c) If the minor or incompetent person does not have a conservator to represent the person as defendant, the action may not proceed until the court appoints a guardian ad litem . . . .

Thus, contrary to defendant's argument, the current court rules specifically allow a guardian or conservator to bring an action for divorce on behalf of a mentally incompetent spouse. See *Houghton*, 256 Mich App at 338 ("We agree with the reasoning in *Smith* and conclude that, on the basis of MCR 3.202(A) and MCR 2.201(E), a guardian can bring an action for divorce on behalf of an incompetent spouse.").

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be defended by such guardian in behalf of the infant or incompetent person.' " *Id.*, quoting GCR 1963, 201.5(1).

Defendant also argues that MCR 3.202(A) conflicts with MCL 552.11, which provides that "[a]n action for a divorce may be brought by a wife or a husband, and in all cases the respondent may answer the bill without oath or affirmation." Defendant argues that because MCL 552.11 only refers to a wife and a husband bringing an action for divorce, no one else can do so, even when acting on behalf of one spouse. A similar argument was rejected in *Houghton*, 256 Mich App at 338-339:

> Defendant appears to be suggesting that if the Legislature intended to provide for actions by a guardian, the Legislature would have expressly provided for this in MCL 552.6. However, the converse argument can be made that, had the Legislature intended to prohibit actions by guardians on behalf of a spouse, it would have expressly said so in the language of MCL 552.6. Nothing in the language of MCL 552.6 expressly prohibits guardians from filing a complaint for divorce on behalf of a party to the marriage. Defendant has not shown how the language in MCR 3.202(A), providing in relevant part that "incompetent persons may sue and be sued as provided in MCR 2.201," changes the statutory requirements for divorce.
>
> Defendant further argues that MCR 3.202(A) is unconstitutional because it is in conflict with the statutory requirements of MCL 552.6. However, as noted above, the court rule does not change the statutory provisions pertaining to divorce and, therefore, the premise of defendant's argument fails.

The above reasoning is equally applicable to this case. Had the Legislature intended to prohibit an action by a guardian on behalf of a spouse, it could have expressly said so in the language of MCL 552.11.[6]

[6] Defendant's policy argument—that allowing guardians to file for divorce on behalf of an incompetent spouse who never filed for divorce while competent could lead to divorces brought by family members

Nothing within the language of MCL 552.11 expressly prohibits a guardian or conservator from filing a complaint for divorce on behalf of an incompetent spouse. Consequently, we reject defendant's argument on this issue.

B. JURISDICTION TO ENTER A DIVORCE

Turning now to the second issue raised by defendant, we must decide whether the trial court properly denied defendant's second motion for summary disposition, which challenged the trial court's authority to enter a divorce judgment. As we have already noted, this Court reviews de novo a trial court's decision on a motion for summary disposition. *Driver*, 490 Mich at 246. To the extent this Court's review requires consideration of subject-matter jurisdiction, our review is also de novo. *Pontiac Food Ctr v Dep't of Community Health*, 282 Mich App 331, 335; 766 NW2d 42 (2009). Issues of constitutional interpretation are likewise reviewed de novo. *Dep't of Transp v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008).

At issue is the meaning of article 1, § 25 of the Michigan Constitution of 1963. In interpreting constitutional provisions, the primary duty of the judiciary is to ascertain the purpose and intent of the provision at issue. *Adair v Michigan*, 486 Mich 468, 477; 785 NW2d 119 (2010). In doing so, courts apply the rule of common understanding: "[T]he interpretation given the provision should be the sense most obvious to the common understanding and one that reasonable minds, the great mass of the people themselves, would give it." *Id*. (quotation marks and citations omitted). Words should

(acting as guardians or conservators) merely for financial gain—is an interesting one. But those arguments are properly made to the Legislature or the Supreme Court (in its rulemaking function), not this Court.

be given their common and most obvious meaning, and consideration of dictionary definitions used at the time of passage for undefined terms can be appropriate. *Nat'l Pride at Work, Inc v Governor*, 481 Mich 56, 67, 69, 73, 75; 748 NW2d 524 (2008).

There is no dispute that a same-sex marriage is not recognized in Michigan. The constitutional amendment defining marriage approved by Michigan voters in 2004, and which is set forth in Const 1963, art 1, § 25, provides: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only *agreement* recognized as a marriage or similar union for any purpose." (Emphasis supplied.) Based on this language, the marriage amendment provides that the only "agreement" recognized as a marriage is one made between a man and a woman. Consistent with the marriage amendment, MCL 551.1 renders invalid a marriage that is contracted between individuals of the same sex:

> Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage *contracted between individuals of the same sex* is invalid in this state.[7] [Emphasis added.]

Consequently, the constitution and statutes of Michigan preclude the recognition or validity of a marriage contracted between two persons of the same sex. Or, as

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[7] As the *Nat'l Pride* Court recognized, there are several other statutes that spell out what does, or does not, constitute a marriage in Michigan. *Nat'l Pride*, 481 Mich at 72 n 9. MCL 551.2, for example, provides: "So far as its validity in law is concerned, marriage is a civil contract between a man and a woman, to which the consent of parties capable in law of contracting is essential."

stated by our Supreme Court in *Nat'l Pride*, 481 Mich at 76-77, "the marriage amendment specifically states that the 'only' agreement that can be recognized as a marriage . . . is the union of one man and one woman." More specifically, the Court held:

> However, the marriage amendment specifically states that the "only" *agreement* that can be recognized as a marriage or similar union is the union of one man and one woman. "Only" means "the single one . . . of the kind; lone; sole[.]" *Random House Webster's College Dictionary* (1991). Therefore, a single *agreement* can be recognized within the state of Michigan as a marriage or similar union, and that single *agreement* is the union of one man and one woman. A domestic partnership does not constitute such a recognizable agreement.[8] [*Nat'l Pride*, 481 Mich at 76-77.] [Emphasis added.]

There is no dispute that when the parties entered into their marriage contract defendant was a man and plaintiff was a woman. Thus, the marriage contract was valid and enforceable under Michigan law at the time it was entered. And although defendant underwent gender reassignment surgery in 2003, that does not alter the undisputed fact that when the marriage contract was entered into, plaintiff was a woman and defendant was a man. Therefore, by granting a divorce from a marriage that was contracted into in this state between a man and a woman, the trial court did not act contrary to Michigan law.

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[8] The marriage amendment's focus on the agreement to marry is consistent with Michigan law, which has always required (among other formalities) a contract between the marrying parties. See *Roszel v Roszel*, 73 Mich 133, 137; 40 NW 858 (1888); MCL 552.35. The amendment also confirmed what was longstanding Michigan law, i.e., that "[t]o constitute a perfect union, the contracting parties should be two persons of the opposite sexes . . . ." *In re Fitzgibbons' Estate*, 162 Mich 416, 420; 127 NW 313 (1910) (quotation marks and citation omitted).

We likewise reject defendant's argument that his alleged postoperative status somehow magically dissolved what was otherwise a valid marriage. Although, as we have pointed out, a valid marriage requires contractual assent between the parties, that is not all that is required. Indeed, it has long been true that a marriage is comprised of more than a civil contract. In *Kuntz v Kuntz*, 244 Mich 78, 81; 221 NW 285 (1928), the Supreme Court held: "Marriage is more than a civil contract. Rights are acquired and obligations assumed which the parties themselves may not annul. They are bound thereby unless the courts, acting under legislative authority, shall terminate the relation by a decree of divorce."

Our statutes also make clear that there are only certain limited circumstances under which a Michigan marriage can be annulled, and the circumstances presented by this case do not fall within those narrow circumstances. See MCL 552.1, 552.2, 552.3, 552.35, and *Rodenhiser v Duenas*, 296 Mich App 268, 279-281; 818 NW2d 465 (2012). Once validly entered into, one spouse's actions cannot unilaterally result in the legal dissolution of the marriage without court involvement. The circuit court had jurisdiction to enter a judgment of divorce for a marriage validly entered into between one man and one woman in Michigan.[9]

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[9] Though our holding puts to rest defendant's challenge to the circuit court's jurisdiction, we point out that the constitution and relevant statutes explicitly state that only a marriage agreement between one man and one woman is recognized by Michigan law. Under the most obvious and commonly understood meaning of the words "man" and "woman," a postoperative male-to-female transsexual is not a "woman." *Random House Webster's College Dictionary* (2001) defines "man" as "an adult male person[.]" "Male," in turn, is defined as "a person bearing an X and Y chromosome pair in the cell nuclei and normally having a penis, scrotum, and testicles and developing hair on the face at adolescence" and "an organism of the sex or sexual phase that normally produces a

Affirmed. No costs, a question of public importance at issue. MCR 7.219(A).

MARKEY and WHITBECK, JJ., concurred with MURRAY, P.J.

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sperm cell or male gamete." *Id*. "Woman" is defined as "an adult female person," and "female" is defined as "a person of the sex whose cell nuclei contain two X chromosomes and who is normally able to conceive and bear young" or "any organism of the sex or sexual phase that normally produces egg cells." *Id*. Based on these definitions, it would appear that defendant is not a woman under the marriage amendment and marriage statutes because he still has an X and Y chromosome pair and cannot—and never could—bear children. We note that other jurisdictions have reached this conclusion, see *Kantaras v Kantaras*, 884 So2d 155 (Fl App, 2004) and *In re Estate of Gardiner*, 273 Kan 191, 214; 42 P3d 120 (2002), but we need not do so here.

PEOPLE v DAVIS

Docket No. 309525. Submitted April 2, 2013, at Lansing. Decided April 16, 2013, at 9:10 a.m.

Stafano A. Davis was convicted by a jury in the Calhoun Circuit Court, James C. Kingsley, J., of voluntary manslaughter and possession of a firearm during the commission of a felony. Defendant was sentenced to 7 to 15 years' imprisonment for the manslaughter conviction to be served consecutive to a term of two years' imprisonment for the felony-firearm conviction. Defendant appealed. The Court of Appeals affirmed the convictions and remanded the case to the circuit court for reconsideration of the scoring of offense variable (OV) 13, MCL 777.43, and correction of the presentence investigation report. *People v Davis*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 2011 (Docket No. 299343). On remand, the trial court determined that OV 13, which considers a continuing pattern of criminal behavior, did not apply but determined that OV 5, MCL 777.35, which considers psychological injury to members of a victim's family, did apply and scored 15 points for OV 5. Defendant was resentenced to 78 months' to 15 years' imprisonment for the manslaughter conviction to be served consecutive to a term of two years' imprisonment for the felony-firearm conviction. Defendant appealed.

The Court of Appeals *held*:

1. The order of the Court of Appeals remanding the matter to the trial court did not limit the trial court's consideration to only a consideration whether OV 13 was properly scored. The order specifically gave the trial court discretion to resentence defendant if it found OV 13 to have been improperly scored. Because it did so find, it had full authority to resentence defendant, placing the case in a presentence posture. Consequently, the trial court was able to consider other issues at resentencing, including consideration of a newly submitted victim's impact statement from the victim's biological mother, who had given up the victim for adoption at an early age, in which she indicated that following the victim's death she had suffered depression and a nervous breakdown, resulting in the need to take additional medications. The evidence supported the scoring of OV 5.

2. The victim's biological mother is a "member of the victim's family" for purposes of OV 5. Nothing in the language of the statute limits the term "family" to people with whom one has a legal relationship. Although the biological mother gave the victim up for adoption, they are still connected by blood.

Affirmed.

1. APPEAL — MOTIONS AND ORDERS — REMAND PROCEEDINGS.

Proceedings on remand are limited to the scope of the remand order; the lower court, on remand, may take such action as law and justice may require as long as it is not inconsistent with the judgment of the appellate court.

2. APPEAL — MOTIONS AND ORDERS — LAW OF THE CASE — REMAND PROCEEDINGS.

When an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same; the doctrine of the law of the case has no application when a case is remanded without directions to the lower court and the lower court enjoys the same power as if it made the ruling itself.

3. CRIMINAL LAW — SENTENCES — RESENTENCING ON REMAND — PRESENTENCE INVESTIGATION REPORTS.

A case is placed in a presentence posture once a defendant's original sentence has been vacated by an appellate court and the matter has been remanded for resentencing; at resentencing, every aspect of the sentence is before the trial court de novo; the trial court may consider the contents of the presentence investigation report when calculating the sentencing guidelines and the victims may have their victim's impact statements included in the report.

4. CRIMINAL LAW — OFFENSE VARIABLES — OFFENSE VARIABLE 5 — WORDS AND PHRASES — VICTIM'S FAMILY.

A biological mother who has given up her child for adoption may be considered a member of the child's "family" for purposes of scoring offense variable 5, psychological injury to member of victim's family; the statute does not limit the term "family" to people with whom one has a legal relationship (MCL 777.35).

*Bill Schuette*, Attorney General, *John J. Bursch*, Solicitor General, *Susan K. Mladenoff*, Prosecuting

Attorney, and *Brandon S. Hultink*, Assistant Prosecuting Attorney, for the people.

*Law Offices of Suzanna Kostovski* (by *Suzanna Kostovski*) for defendant.

Before: M. J. KELLY, P.J., and CAVANAGH and MURRAY, JJ.

MURRAY, J. Defendant Stafano Adeesa Davis was convicted by a jury of voluntary manslaughter, MCL 750.321, and possession of a firearm during commission of a felony, MCL 750.227b. He was originally sentenced to 7 to 15 years' imprisonment for manslaughter, to be served consecutive to the felony-firearm sentence. After these convictions, defendant appealed, and we ultimately affirmed the convictions but remanded the case for reconsideration of the scoring of offense variable (OV) 13, MCL 777.43, and for correction of the presentence investigation report (PSIR). See *People v Davis*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 2011 (Docket No. 299343), p 1. Pursuant to this Court's remand order, the trial court determined that OV 13 did not apply, but then scored 15 points for OV 5, MCL 777.35. Defendant was resentenced to 78 months' to 15 years' imprisonment for the manslaughter conviction, with 787 days' credit. Defendant now appeals that judgment of sentence as of right, arguing that the trial court improperly scored OV 5 at resentencing. We affirm.

## I. FACTS AND PROCEEDINGS

The underlying facts of this case were summarized by this Court in *Davis*, unpub op at 2-4, but they need not be recounted here because they are irrelevant to the issue on appeal. For our current purpose, what is

important from this Court's prior decision is that we ultimately remanded the case "for reconsideration of the scoring of OV 13," which would entail the trial court determining whether "the prosecution has established, by a preponderance of the evidence, that defendant committed a combination of three or more crimes against a person or property as is required under MCL 777.43(1)(d) . . . ." *Id*. at 8. We indicated that if OV 13 was properly scored, "the court may deny resentencing. If, however, the court determines that defendant did not commit three such crimes, the court should consider whether to resentence defendant." *Id*., citing *People v Chesebro*, 206 Mich App 468, 474; 522 NW2d 677 (1994), overruled in part on other grounds *People v McGraw*, 484 Mich 120, 133 n 42 (2009).

At the hearing held on remand, defendant and the prosecution both acknowledged that OV 13 was improperly scored, and the trial court agreed to resentence defendant. In doing so, the trial court requested the probation department to update the PSIR, indicating that it was primarily interested in how defendant had acted while in prison.

Before resentencing, the victim's biological mother submitted a victim's impact statement that had not been included with the original PSIR. The statement provided, in part:

> My heart aches everyday for my son and the life that was taken away so brutally by [defendant]. My 2 grandsons has [sic] lost their father and my son has lost a brother. Demar will never get to see his boys grow up. The taking of my son's life sent me through a life changing event. I am more depressed than before, I had a nervous breakdown and I'm taking more medications now. I cry almost every day and I am so lost.
>
> * * *

> I had a nervous breakdown and my life is no longer happy. I am depressed I am a grandmother & father to my grandsons. I feel the lost [sic] of my child every day. I stay in my house more and I am so afraid for my son that I have left. I never expected for my son to die before me. [Defendant] you took my son['s] life. You don't deserve to live either.

Based on this statement the updated sentencing information report (SIR) indicated that an additional 15 points should be scored for OV 5, which scores serious psychological injury to a victim's family requiring professional treatment. MCL 777.35. Defendant objected to the scoring of OV 5. In doing so, defense counsel conceded that the prosecution was not estopped from filing an amended SIR, but nevertheless argued that as "a matter of fairness" the prosecution should not be able to have another OV scored to merely make up for the erroneously scored OV 13. Defendant also asserted that scoring 15 points for OV 5 was inappropriate because it was based on the alleged effect of his crime on the victim's birth mother, even though the victim had been adopted at a young age.

The trial court found that defendant's offense had been "a life-changing event" for the biological mother that caused her to have "[a] nervous breakdown," which in turn resulted in her becoming "more depressed than before," which then led her to take "more medications" and left her "cry[ing] almost every day." The trial court noted:

> As an adoptive mother [sic] she may not have been as closely involved in the victim's life as she would have been had the adoption not occurred, but the point of it is . . . from what she says that there was some kind of close and continuing relationship, when she makes reference to the victim's death impacting her other son. It has impacted her grandsons. And by making that kind of reference to me it is

> reasonable to assume, [defense counsel], that there was a closer relationship than would have been logically inferred based upon your comments.

The trial court then determined that scoring 15 points for OV 5 was warranted.

In resentencing defendant, the trial court analyzed four factors: (1) punishment, which the trial court found to be inherent in his active prison sentence; (2) protection of society, where the trial court noted defendant's "history of assaultive conduct and weapons"; (3) rehabilitation, which although the trial court expressed some skepticism that defendant had changed in any meaningful way, it still "accept[ed] what your lawyer sa[id]," and (4) deterrence to others, where the trial court spoke of its desire to reduce gang violence, but "acknowledge[d] that [it] cannot," eliminate such activity. The trial court weighed these factors and sentenced defendant within the guidelines to a term of $6^1/_2$ years' to 15 years' imprisonment, noting that "[t]his isn't much different than . . . the first sentence—but it is a recognition that [defendant has] begun to do some positive things."[1]

## II. ANALYSIS

Defendant's sole argument—which has two components—is that the trial court erred when scoring OV 5. "The interpretation and application of the legislative sentencing guidelines, MCL 777.1 *et seq*.[,] involve legal questions that this Court reviews de novo." *McGraw*, 484 Mich at 123. "To the extent that a challenge to the trial court's scoring of a variable

[1] Because the trial court did not increase defendant's sentence on remand, but in fact reduced the minimum sentence, there is no issue of vindictiveness raised in this appeal. *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002).

involves a question of statutory interpretation, this Court reviews de novo questions of statutory interpretation." *People v Ericksen*, 288 Mich App 192, 202; 793 NW2d 120 (2010), citing *People v Osantowski*, 481 Mich 103, 107; 748 NW2d 799 (2008). "This Court reviews a trial court's scoring of a sentencing guidelines variable for clear error. A scoring decision is not clearly erroneous if the record contains '*any* evidence in support of the decision.' " *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012), quoting *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003) (quotation marks and citations omitted). An error in the calculation of the recommended minimum sentence range that increases the length of the defendant's sentence constitutes error requiring reversal. *People v Francisco*, 474 Mich 82, 88-91; 711 NW2d 44 (2006) (a defendant is entitled to resentencing on the basis of a scoring error if the error changes the recommended minimum sentence range under the legislative sentencing guidelines).

As an initial matter, defendant argues that the trial court had no authority to score OV5, as it was outside the scope of the remand from this Court. Although both parties base their arguments in part on federal law, specifically 28 USC 2106 and federal circuit court decisions interpreting it, reliance on this federal law is unnecessary as Michigan law adequately addresses the scope of a remand.

"When a case is remanded by an appellate court, proceedings on remand are limited to the scope of the remand order." *People v Canter*, 197 Mich App 550, 567; 496 NW2d 336 (1992), citing *People v Blue*, 178 Mich App 537, 539; 444 NW2d 226 (1989). "[I]f an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently

determined on a subsequent appeal in the same case where the facts remain materially the same." *People v Fisher*, 449 Mich 441, 444-445; 537 NW2d 577 (1995) (quotation marks and citation omitted). However:

> The power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court. Likewise, the doctrine of the law of the case has no application where a case is remanded without directions to the lower court; in such a case the lower court would enjoy the same power as if it made the ruling itself. [*Id.* at 446-447, citing *Lyon v Ingham Circuit Judge*, 37 Mich 377 (1877), and *Garwood v Burton*, 274 Mich 219, 222; 264 NW 349 (1936) (quotation marks and citation omitted).]

As relevant to this case, once an original sentence is vacated, the case is placed in a presentence posture. *People v Rosenberg*, 477 Mich 1076 (2007); *People v Ezell*, 446 Mich 869 (1994). As a result, at resentencing, "every aspect of the sentence is before the judge de novo[.]" *People v Williams (After Second Remand)*, 208 Mich App 60, 65; 526 NW2d 614 (1994). The trial court may consider the contents of the presentence investigation report when calculating the guidelines and the victims may have their statements included in the PSIR. MCL 780.764; MCL 780.765; *Morales v Parole Bd*, 260 Mich App 29, 45-46; 676 NW2d 221 (2003); *People v Williams*, 244 Mich App 249, 253-254; 625 NW2d 132 (2001); *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993).

As noted, we previously remanded this case for the trial court to reconsider the scoring of OV 13. We also said that, if "the court determines that defendant did not commit three such crimes, the court should consider whether to resentence defendant." *Davis*, unpub op at 8. Thus, this Court's remand order did not limit

the trial court's ability to only a consideration of whether OV 13 was properly scored, as the court was specifically given discretion to resentence defendant if it found OV 13 to have been improperly scored. Because it did so find, it had full authority to resentence defendant, placing the case in a presentence posture. *Rosenberg*, 477 Mich 1076. Consequently, the trial court was able to consider and decide other issues at resentencing once it determined that OV 13 had been erroneously scored. See *Williams (After Second Remand)*, 208 Mich App at 65 (every aspect of the sentence was before the judge de novo). This includes consideration of the newly appended victim's impact statement. See *People v Waclawski*, 286 Mich App 634, 691-692; 780 NW2d 321 (2009).

We now turn to whether the trial court properly scored OV 5.

"To calculate the appropriate guidelines range, a court must determine the offense category and which offense variables apply, score the offense variables, total the points" and determine the variable levels. *People v Wiggins*, 289 Mich App 126, 129; 795 NW2d 232 (2010), citing MCL 777.21(1). "The court must then use the resultant offense variable level and prior record variable level with the applicable sentencing grid to determine the recommended minimum sentence range." *Wiggins*, 289 Mich App at 129. "Generally, once the sentencing court calculates the defendant's guidelines range, it must, absent substantial and compelling reasons, impose a minimum sentence within that range." *People v McCuller*, 479 Mich 672, 684-685; 739 NW2d 563 (2007), citing MCL 769.34(2). "A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence." *Osantowski*, 481 Mich at 111.

MCL 777.35(1)(a) provides that OV 5 should be scored at 15 points if "[s]erious psychological injury requiring professional treatment occurred to a victim's family," while MCL 777.35(2) indicates that 15 points should be scored "if the serious psychological injury to the victim's family may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive."

Defendant argues that the victim's biological mother should not be considered part of the victim's "family" for purposes of OV 5 where he was adopted as a child. The statute does not define "a member of a victim's family," so it is up to the judiciary to determine its meaning. "Any term not defined by the statute 'should be accorded its plain and ordinary meaning, taking into account the context in which the words are used . . . .' " *People v Crews*, 299 Mich App 381, 390; 829 NW2d 898 (2013), quoting *People v Lange*, 251 Mich App 247, 253; 650 NW2d 691 (2002). "[I]t is permissible for this Court to consult dictionary definitions in order to aid in construing the term 'in accordance with [its] ordinary and generally accepted meaning[].' " *Lange*, 251 Mich App at 253, quoting *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

"Family," is defined in relevant part as "[a] group of persons connected by blood, by affinity, *or* by law, esp. within two or three generations." Black's Law Dictionary (9th ed) (emphasis added). More commonly, "family" is defined, among other ways, to include parents and their children, a person's spouse and children, or any group of people closely related by blood. *Random House Webster's College Dictionary* (2001). Although the biological mother may have given the victim up for adoption, this does not undermine their continued "connect[ion] by blood . . . ." Black's Law Dictionary

(9th ed). And, nothing in the language of the statute limits the term "family" to people with whom one has a legal relationship. This Court will not read language into a statute that is not "within the manifest intent of the Legislature as derived from the words of the statute itself." *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003) (quotation marks and citation omitted). If the Legislature intended to narrowly define "family" in the context of OV 5 to include only those people having a blood connection *and* a legally recognized relationship, it could have done so by adding the word "legal" before the word "family." Accordingly, we hold that the victim's biological mother is a "member of the victim's family" for purposes of OV 5.

Finally, the assessment of 15 points under OV 5 was supported by the record. The trial court found, based upon the content of the victim's impact statement, that defendant's acts had caused the victim's biological mother to have suffered depression and a nervous breakdown that resulted in her receiving more medication than before the crime. This is evidence of "serious psychological injury to the victim's family [that] may require," or did require, "professional treatment," and therefore constituted sufficient evidence in support of scoring 15 points for OV 5. MCL 777.35(2). Therefore, we reject defendant's argument that "there was no evidence to support the scoring of OV 5." See *Lockett*, 295 Mich App at 183.

Affirmed.

M. J. KELLY, P.J., and CAVANAGH, J., concurred with MURRAY, J.

KINCAID v CARDWELL

Docket No. 310045. Submitted February 12, 2013, at Lansing. Decided April 18, 2013, at 9:00 a.m.

Brenda Kincaid brought a medical malpractice action in the St. Clair Circuit Court against Laura LaMar, D.P.M.; LaMar's practice, Hodor and Frascone D.P.M., P.C.; Robert Cardwell, M.D.; and Cardwell's practice, St. Clair Cardiovascular Surgeons, P.L.C. She subsequently amended her complaint to name only Cardwell and St. Clair Cardiovascular as defendants. Following a foot injury, Kincaid had seen LaMar, who subsequently referred her to Cardwell. Kincaid's first visit to Cardwell was on April 25, 2008. Cardwell ordered several tests, and Kincaid saw him several more times as her symptoms worsened. On July 9, 2008, Cardwell referred Kincaid to another doctor to consider whether she needed a toe amputated. On July 21, 2008, Kincaid's leg was amputated below her knee. Kincaid's complaint alleged that Cardwell and St. Clair Cardiovascular had breached the standard of care for several months up to the amputation. Cardwell and St. Clair Cardiovascular moved for summary disposition under MCR 2.116(C)(7). Relying on Kincaid's April 5, 2010, notice of intent to sue (NOI), they asserted that Kincaid's claim had accrued on April 25, 2008; that with tolling of the limitations period during the notice period, Kincaid had until October 25, 2010, to file her complaint; and that her complaint filed on November 30, 2010, was thus untimely. Kincaid asserted that Cardwell had breached the standard of care during subsequent appointments in June and July 2008, though she did not specify particular acts or omissions, and that she accordingly had until December 7, 2010, to sue. The court, Cynthia A. Lane, J., concluded that Kincaid's claim had accrued on April 25, 2008, and granted Cardwell and St. Clair Cardiovascular summary disposition. Kincaid appealed.

The Court of Appeals *held*:

1. Under MCL 600.5805(6), the period of limitations for a medical malpractice action is two years from the date the claim accrued. MCL 600.2912b(1) provides that a plaintiff must give the defendant an NOI not less than 182 days before the plaintiff commences the action, and under MCL 600.5856(c) the limitations

period is tolled for the 182-day notice period if the plaintiff gave the NOI before the limitations period expired. Kincaid gave her NOI within two years of April 25, 2008 (the earliest accrual date possible) and thus was entitled to the full 182 days of tolling. Consequently, if her medical malpractice claim accrued on or after June 1, 2008 (which was two years and 182 days before November 30, 2010, the date she filed her complaint), her claim would be timely. If it accrued before that date, it would be barred under MCL 600.5805(1).

2. Under the last-treatment rule, the cessation of the ongoing patient-physician relationship, that is, the last day that the physician treated the plaintiff, marked the point at which the limitations period for medical malpractice began to run. In 1986 PA 178, the Legislature abrogated the last-treatment rule. MCL 600.5838a(1) now provides that a medical malpractice claim accrues at the time of the act or omission that is the basis for the claim. The Legislature did not limit a plaintiff to asserting a single claim for medical malpractice for any given injury. Because a plaintiff's injury can be causally related to multiple acts or omissions, it is possible for the plaintiff to allege multiple claims of malpractice premised on discrete acts or omissions (even when those acts or omissions lead to a single injury) and those claims will have independent accrual dates determined by the date of the specific act or omission at issue. The fact that a plaintiff may be able to plead multiple accrual dates, however, does not mean that the plaintiff may resurrect the last-treatment rule through ambiguous or creative pleading. A plaintiff cannot revive the last-treatment rule by merely pleading that the defendant had an on-going or continuing duty to act throughout the duration of the patient-physician relationship or by simply pleading that his or her physician continued to adhere to a mistaken diagnosis or treatment plan throughout the duration of the patient-physician relationship.

3. Under the proper facts, continued adherence to a particular diagnosis or treatment plan might constitute a discrete negligent act or omission for purposes of determining the accrual date. A plaintiff must plead facts that are sufficient to place the defendant physician on notice of the specific acts or omissions that the plaintiff believes caused his or her injuries. Depending on the complexity of the acts or omissions at issue, this may require the plaintiff to identify with some degree of specificity how the physician breached the standard of care. In the context of a physician's continued adherence to an initial diagnosis or treatment plan after the abrogation of the last-treatment rule, it is

insufficient to merely allege that the defendant breached the standard of care by continuing to adhere to the original diagnosis or treatment plan. To establish that continued adherence to an initial diagnosis or treatment plan constitutes a discrete act or omission after the date when the initial diagnosis or plan was adopted, the plaintiff must plead and be able to prove facts that would establish that the continued adherence at the later point constituted a breach of the duty owed to the plaintiff. A physician is not immunized from liability by simply adhering to a mistaken diagnosis or treatment plan at all subsequent appointments. Rather, a physician must act within the standard of care on each visit, and a physician's continued adherence to a particular diagnosis or treatment plan at a later appointment might constitute a breach of the standard of care if there are facts that show that continued adherence was unreasonable. Moreover, if the continued adherence to the diagnosis or treatment plan constitutes a breach of the standard of care, the plaintiff may seek redress for the harms caused by that breach as a separate claim, even if the initial adoption of the diagnosis or treatment plan was itself outside the limitations period. In other words, the plaintiff can plead and prove that his or her physician's failure to correct the initial diagnosis or treatment plan constituted a breach of the standard of care that was distinct from the initial adoption of the diagnosis or treatment plan.

4. In her complaint, Kincaid referred to several generic acts and omissions that she alleged caused her injury. She did not, however, provide any details about the acts or omissions that would relate the acts or omissions to her specific course of treatment. She also did not identify any specific dates for a particular act or omission, but described these failings as occurring in the months leading up to her amputation on July 21, 2008. In her NOI, Kincaid stated the same generic assertions, but she also identified specific tests that Cardwell should have performed, the point at which he allegedly failed to properly diagnose her, and the point at which he should have warned her that he was not qualified to treat her and failed to refer her to someone who was qualified. When Kincaid's complaint was read in light of her NOI, the discrete acts or omissions that served as the basis for her malpractice claims all occurred before June 1, 2008. Her general allegations that at all times Cardwell had failed in certain regards could not save her claims because they did not allege discrete acts or omissions that occurred on specific dates after his first treatment on April 25, 2008. In the absence of more specific allegations or evidence, all later acts and omissions involving the failure to inform, refer, and treat were simply part of Cardwell's continuing

course of treatment, and Kincaid could not rely on that continuing treatment alone to establish later accrual dates. While Kincaid's NOI provided some additional details concerning the specific acts or omissions that supported her claims, it was clear that each act or omission had occurred before June 1, 2008. Thus, because Kincaid's claims were untimely on the face of her pleadings, Cardwell and St. Clair Cardiovascular initially established that they were entitled to summary disposition, and the burden shifted to Kincaid to show that there was at the very least a question of fact about whether her claims were timely. She failed to present evidence to establish a question of fact about whether Cardwell committed an act or omission on or after June 1, 2008, and the trial court did not err by granting Cardwell and St. Clair Cardiovascular summary disposition.

Affirmed.

NEGLIGENCE — MEDICAL MALPRACTICE — LAST-TREATMENT RULE — BREACH OF PHYSICIAN'S DUTY — CONTINUED ADHERENCE TO INITIAL DIAGNOSIS OR TREATMENT PLAN.

A medical malpractice claim accrues at the time of the act or omission that is the basis for the claim; a plaintiff cannot merely plead that the defendant physician had an on-going or continuing duty to act throughout the duration of the patient-physician relationship or that the defendant continued to adhere to a mistaken diagnosis or treatment plan throughout the duration of that relationship; to establish that continued adherence to an initial diagnosis or treatment plan constituted a discrete act or omission after the date when the initial diagnosis or plan was adopted, the plaintiff must plead and be able to prove facts that would establish that the continued adherence at the later point constituted a breach of the duty owed to the plaintiff that was distinct from the initial adoption of the diagnosis or treatment plan; a physician is not immunized from liability by simply adhering to a mistaken diagnosis or treatment plan at all subsequent appointments, but must act within the standard of care on each visit, and a physician's continued adherence to a particular diagnosis or treatment plan at a later appointment may constitute a breach of the standard of care if there are facts that show that continued adherence was unreasonable; if the continued adherence to the diagnosis or treatment plan constitutes a breach of the standard of care, the plaintiff may seek redress for the harms caused by that breach as a separate claim, even if the initial adoption of the diagnosis or treatment plan was itself outside the limitations period (MCL 600.5838a[1]).

*Fieger, Fieger, Kenney, Giroux & Danzig P.C.* (by *Geoffrey N. Fieger* and *Sima G. Patel*) for Brenda Kincaid.

*Plunkett Cooney* (by *Robert G Kamenec* and *Josephine A. DeLorenzo*) for Robert Cardwell, M.D., and St. Clair Cardiovascular Surgeons, P.L.C.

Before: FITZGERALD, P.J., and METER and M. J. KELLY, JJ.

M. J. KELLY, J. In this medical malpractice suit, plaintiff Brenda Kincaid appeals by right the trial court's order dismissing her suit against defendants Robert J. Cardwell, M.D., and his practice, St. Clair Cardiovascular Surgeons, P.L.C., on the grounds that her suit was untimely. On appeal, we conclude that Kincaid failed to rebut the evidence that her claims were untimely. For that reason, we affirm.

## I. BASIC FACTS

On March 17, 2008, Kincaid dropped a piece of lumber while working and injured her left foot. She went to the hospital, but x-rays did not reveal any fractures. She then saw Anca Rusu-Lenghel, M.D., for pain in her foot on April 7, 2008, and was referred to a podiatrist, Laura LaMar, D.P.M.[1]

Kincaid saw LaMar on April 23, 2008, with complaints of "numbness, burning, and pain" in her left foot since the original injury. Kincaid's foot had some discoloration and blisters at the time. LaMar referred

[1] We have derived the facts relating to Kincaid's doctor's visits from her medical records, which she attached to her brief in response to the motion for summary disposition.

Kincaid to Vernon Dencklau, D.O., but Kincaid ended up seeing one of Dencklau's partners, Cardwell.

Kincaid saw Cardwell for the first time on April 25, 2008. Cardwell examined Kincaid's foot and leg and noted that her "left great toe is discolored, tender, and has some edema." He wrote that her "two smallest toes of the left [foot] have darkened areas, which are moderately firm." Cardwell diagnosed Kincaid as having "traumatic foot injury, which has had poor healing likely secondary to compromised blood flow to her left lower extremity." Kincaid had a lower extremity Doppler study on the same visit, and the study was "consistent with potentially severe arterial occlusive disease of the left lower extremity . . . ." Cardwell also ordered a magnetic resonance angiogram (MRA) on Kincaid's aorta and lower extremities.

Kincaid had the MRA on April 28, 2008. The MRA revealed some occlusion in Kincaid's "left anterior tibial artery" and some narrowing of the "proximal posterior tibial arteries bilaterally," but did not otherwise reveal significant "flow limiting stenosis" in the "lower extremity runoff."

Cardwell examined Kincaid again on May 7, 2008. He noted a "persistent discoloration of her left great toe and two smallest toes." He also discussed the MRA results with Kincaid and stated that there were mild signs of arterial disease in Kincaid's "left posterior tibial" artery and "moderate to possibly severe" signs of disease in the "anterior tibial artery." However, he noted that there was still good blood flow to her foot at the time. He instructed her to quit smoking and to return in two weeks.

Kincaid returned to Cardwell on June 6, 2008, with reports of severe pain. Cardwell performed a second Doppler study, which showed mild "diminished [blood]

flow to [Kincaid's] left ankle area" and that her "anterior tibial artery [was] occluded on the left." He prescribed Keflex and Percocet and asked Kincaid to return for a follow-up.

Cardwell saw Kincaid again on June 16, 2008. He noted that she had "worsening discomfort and discoloration of her left fourth and fifth toes" and stated that it might be necessary to consider amputation because "there is nothing to revascularize" the foot.

Kincaid next saw Cardwell on July 9, 2008. At that time, Cardwell observed that Kincaid had gangrene in her great and fourth toes. He then referred her to Sadiq Hussain, M.D., for consideration of a left fourth toe amputation. Dencklau, who worked with Hussain, saw Kincaid on July 17, 2008, and determined that she had no bypassable vessels with which to revascularize her foot. As such, he recommended amputation. Dencklau amputated Kincaid's left leg below the knee on July 21, 2008.

Kincaid sued LaMar; LaMar's practice, Hodor and Frascone D.P.M., P.C.; Cardwell; and Cardwell's practice, St. Clair Cardiovascular Surgeons, P.L.C., on November 20, 2010, for malpractice. In her complaint, Kincaid alleged that for "several months leading up to the amputation," defendants breached the applicable standards of care by failing to timely evaluate and treat Kincaid's conditions, failing to refer her to other physicians, failing to warn about the risks, failing to perform appropriate tests, failing to follow up, failing to notify Kincaid's other physicians that they "were not competent or qualified to treat" Kincaid, and failing to otherwise act reasonably.

Kincaid filed an amended complaint with substantially the same allegations in March 2011. However, she only named Cardwell and St. Clair Cardiovascular as

defendants. The circuit court clerk entered an order in July 2011 dismissing Kincaid's claims against Lamar and Hodor and Frascone for failure to serve them.

Kincaid died from lung cancer on October 23, 2011.

On January 3, 2012, Cardwell and St. Clair Cardiovascular moved for summary disposition under MCR 2.116(C)(7). Relying on Kincaid's original notice of intent to sue, which Kincaid had sent on April 5, 2010, Cardwell and St. Clair Cardiovascular argued that Kincaid's claim accrued on either April 25 or May 7, 2008. With the tolling period provided during the notice period, see MCL 600.2912b; MCL 600.5856(c), they maintained that Kincaid had—at the latest—until October 25, 2010, to file her complaint. Because Kincaid did not file her complaint until November 30, 2010, they asserted, it was untimely. Accordingly, they asked the trial court to dismiss Kincaid's complaint with prejudice.

In response to the motion for summary disposition, Kincaid noted that she had not alleged any specific dates in her complaint for Cardwell's breach of the standard of care; rather, she had generally alleged that defendants had breached the standard of care for "several months leading up to the below-the-knee amputation . . . ." Kincaid argued that the evidence showed that Cardwell had breached the standard of care—through undisclosed acts and omissions—on three appointment dates: June 6, June 16, and July 9, 2008. Using June 6, 2008, as the accrual date, Kincaid concluded that her suit was timely. She explained that she had two years from the accrual date to sue, which would be June 6, 2010. See MCL 600.5805(6). However, because the period of limitations was tolled for 182 days after she filed her notice of intent to sue on April 5, 2010, see MCL 600.5856(c), she had until December 7, 2010, to sue.

Cardwell and St. Clair Cardiovascular replied to Kincaid's response on February 24, 2012. They argued that Kincaid was, in effect, relying on the doctrine of continuing wrongs and the last treatment rule, which had been abolished in Michigan. Because the record showed that Kincaid's claims concerned breaches that initially occurred on April 25, 2008, they maintained that the court must use that date as the accrual date.

The trial court held a hearing on Cardwell and St. Clair Cardiovascular's motion on March 5, 2012. At the hearing, Kincaid's lawyer again argued that there were multiple accrual dates because each time Kincaid appeared for an appointment or treatment she had a worsened condition: "It was not the same diagnosis that was being given on each presentment." The trial court determined that, on the basis of the claims stated in her notice of intent to sue, Kincaid's malpractice claim accrued on April 25, 2008. Consequently, it agreed that Kincaid's suit was untimely.

The trial court entered an order dismissing Kincaid's claims under MCR 2.116(C)(7) on March 15, 2012. After the trial court denied Kincaid's motion for reconsideration on April 13, 2012, Kincaid appealed in this Court.

## II. SUMMARY DISPOSITION

### A. STANDARD OF REVIEW

On appeal, Kincaid argues that the trial court erred when it determined that her medical malpractice claim accrued solely on April 25, 2008. Specifically, she contends that she adequately alleged discrete acts and omissions that occurred on each day of treatment. Since she sued within the period of limitations applicable to the breaches of the standard of care that occurred on the last two days of treatment, she maintains that her

suit was timely. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo whether the trial court correctly selected, interpreted, and applied the relevant statutes. *Gay v Select Specialty Hosp*, 295 Mich App 284, 291-292; 813 NW2d 354 (2012).

B. MCR 2.116(C)(7)

Summary disposition under MCR 2.116(C)(7) is appropriate when the undisputed facts establish that the plaintiff's claim is barred under the applicable statute of limitations. See *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). Generally, the burden is on the defendant who relies on a statute of limitations defense to prove facts that bring the case within the statute. *Tumey v Detroit*, 316 Mich 400, 410; 25 NW2d 571 (1947). In determining whether a plaintiff's claim is barred because of immunity granted by law, the reviewing court will accept the allegations stated in the plaintiff's complaint as true unless contradicted by documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Although generally not required to do so, see MCR 2.116(G)(3), a party moving for summary disposition under MCR 2.116(C)(7) may support the motion with affidavits, depositions, admissions, or other admissible documentary evidence, which the reviewing court must consider, *Maiden*, 461 Mich at 119, citing MCR 2.116(G)(5). The reviewing court must view the pleadings and supporting evidence in the light most favorable to the nonmoving party to determine whether the undisputed facts show that the moving party has immunity. *Tryc v Mich Veterans' Facility*, 451 Mich 129, 134; 545 NW2d 642

(1996). If there is no factual dispute, whether a plaintiff's claim is barred under the applicable statute of limitations is a matter of law for the court to determine. *Zwiers v Growney*, 286 Mich App 38, 42; 778 NW2d 81 (2009). However, if the parties present evidence that establishes a question of fact concerning whether the defendant is entitled to immunity as a matter of law, summary disposition is inappropriate. *Id*. In those cases, the factual dispute must be submitted to the jury. See *Tumey*, 316 Mich at 411.

### C. THE PERIOD OF LIMITATIONS

A person cannot sue another "to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff . . . , the action is commenced within the periods of time prescribed" by statute. MCL 600.5805(1). The period applicable to medical malpractice is two years from the accrual date. MCL 600.5805(6). Kincaid sued to recover for her injuries on November 30, 2010. In order for her suit to have been timely, her claim would have had to have accrued not earlier than November 30, 2008, unless tolled.

Kincaid could not sue without first giving Cardwell and St. Clair Cardiovascular notice of her intent to do so "not less than 182 days before the action is commenced." MCL 600.2912b(1). In order to ensure that a plaintiff receives the full benefit of the applicable period, the Legislature provided that the period of limitations is tolled for the 182-day notice period, but only if the plaintiff gave the notice before the expiration of the period of limitations. See MCL 600.5856(c); *Driver v Naini*, 490 Mich 239, 249; 802 NW2d 311 (2011). It is undisputed that the earliest accrual date applicable to Kincaid's suit against Cardwell and St. Clair Cardiovascular was April 25, 2008, and that she gave her notice to

sue within two years of that date. As such, she was entitled to the full 182 days of tolling under MCL 600.5856(c). Consequently, if her medical malpractice claim accrued on or after June 1, 2008, which is two years and 182 days before the date she filed her complaint, her claim would be timely. If, however, it accrued before that date, it would be barred under MCL 600.5805(1).

1. THE LAST TREATMENT RULE

Originally, the Legislature did not provide an accrual point for medical malpractice claims. See *Morgan v Taylor*, 434 Mich 180, 187; 451 NW2d 852 (1990). Instead, courts applied the common-law "last treatment rule" to determine when a plaintiff's medical malpractice claim accrued. *Id*., citing *De Haan v Winter*, 258 Mich 293; 241 NW 923 (1932). Under the common-law rule, the period of limitations would only begin to run after there was a break in the patient-physician relationship: " 'The essence of the last treatment rule is that the cessation of the ongoing patient-physician relationship marks the point where the statute of limitations begins to run.' " *Morgan*, 434 Mich at 188, quoting *Heisler v Rogers*, 113 Mich App 630, 633; 318 NW2d 503 (1982). The rationale was that while the physician is treating the patient, the patient reasonably relies on the physician and is under no duty to inquire into the effectiveness of the physician's measures. *Morgan*, 434 Mich at 187-188. The Legislature codified the rule at MCL 600.5838, as enacted by 1961 PA 236. See *Morgan*, 434 Mich at 189 n 14.[2]

[2] The Court in *Morgan* ultimately concluded that the legislative version of the last-treatment rule was more expansive than the common-law version because it referred to the date the professional discontinued

In 1986, the Legislature abrogated the last-treatment rule for medical malpractice claims. See 1986 PA 178. For all medical malpractice claims arising after October 1, 1986, the accrual date was no longer determined on the basis of the last day that the physician treated the plaintiff—it was determined on the basis of the act or omission that occasioned the harm: "For purposes of this act, a claim based on the medical malpractice of a person or entity . . . accrues at the time of the act or omission that is the basis for the claim of medical malpractice . . . ." MCL 600.5838a(1).

Although the Legislature determined that the last-treatment rule should no longer govern the accrual of medical malpractice claims, it did not replace the last-treatment rule with a first-treatment rule; rather, the accrual date depends on the date of the specific act or omission that the plaintiff claims caused his or her injury. Similarly, while the Legislature referred to "the act or omission" that is the basis for "the claim," MCL 600.5838a(1), the Legislature did not limit a plaintiff to asserting a single claim for medical malpractice for any given injury. Because a plaintiff's injury can be causally related to multiple acts or omissions, it is possible for the plaintiff to allege multiple claims of malpractice premised on discrete acts or omissions—even when those acts or omissions lead to a single injury—and those claims will have independent accrual dates determined by the date of the specific act or omission at issue. See, e.g., *Brackins v Olympia, Inc*, 316 Mich 275, 279-280; 25 NW2d 197 (1946) (noting that there can be more than one proximate cause for the same injury). However, as this Court explained in *McKiney v Clayman*, 237 Mich App 198; 602 NW2d 612 (1999), the fact

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treating or " 'otherwise serving' " the patient. See *Morgan*, 434 Mich at 193. But that holding has no application to the facts of this case.

that a plaintiff may be able to plead multiple accrual dates does not mean that the plaintiff may resurrect the last-treatment rule through ambiguous or creative pleading.

2. *McKINEY*

In *McKiney*, the plaintiff, Susan McKiney, sought treatment from Dr. Lewis Clayman, who was a medical doctor and dentist, for lesions on her tongue in 1989. Clayman removed a cancerous growth from McKiney's tongue in June of that same year. Thereafter, McKiney went to Clayman for recurring spots on her tongue. Clayman opined that the spots were not cancerous and used laser treatments to remove them in 1990, 1992, and 1993. *McKiney*, 237 Mich App at 199.

On December 2, 1993, different doctors tentatively diagnosed McKiney's spots as cancer, and she related that information to Clayman at an appointment on the next day. Clayman continued to state his belief that the spots were not cancerous. McKiney did not return to Clayman for treatment, but did speak with him on the phone several times from January to March 1994 about possible treatments. A biopsy in March 1994 revealed that McKiney had cancer, and McKiney sued Clayman for malpractice on December 21, 1995. *Id*. at 199-200. After the trial court dismissed her claim as untimely under MCR 2.116(C)(7), McKiney appealed.

On appeal in this Court, McKiney argued that her claim was timely because she had continued to receive treatment advice from Clayman by telephone through March 3, 1994. *Id*. at 201. In examining her argument, this Court explained that the date that Clayman last treated McKiney was irrelevant because the Legislature had clearly rejected "the notion that the existence of a continuing physician-patient relationship by itself

could extend the accrual date beyond the specific, allegedly negligent act or omission charged." *Id*. at 203. Instead, the relevant accrual date was the date of the act or omission about which she complained. *Id*., citing MCL 600.5838a(1).

Turning to the acts and omissions that served as the basis of McKiney's claim, the Court noted that McKiney had essentially alleged that Clayman failed to properly diagnose her cancer and failed to properly treat her by conducting appropriate examinations or referring her to more competent healthcare providers. *McKiney*, 237 Mich App at 202. It explained that she did not identify a specific date on which these failures occurred, but instead merely alleged that the "failures represented ongoing deficiencies that continued until the termination date of the parties' physician-patient relationship" in March 1994. *Id*. Notwithstanding these allegations, the Court concluded that McKiney could not rely on any acts or omissions that Clayman might have made through the December 3, 1993 appointment because those acts and omissions would have occurred more than two years before McKiney sued on December 21, 1995.

The Court in *McKiney* conceded that each treatment date through the visit on December 3, 1993, could—in theory—have served as a separate accrual date, but it is also impliedly held that a physician's mere adherence to an initial misdiagnosis and erroneous treatment plan at later appointments was insufficient by itself to give rise to new accrual dates. *Id*. at 204. Although the Court assumed that Clayman's diagnoses and treatments in 1990, 1992, and 1993 "constituted separate acts or omissions that would represent new accrual dates," it clarified that the record did not actually support the conclusion that the treatments were "new, distinct, and

separate acts or omissions" because McKiney's own testimony showed that Clayman merely "adhered to the same diagnosis and treatment determinations" that he had previously made. *Id*. at 204 & n 4. Similarly, the Court held that McKiney's telephone conversations with Clayman through March 3, 1994, did not establish an accrual date in March 1994 because the record evidence again showed that Clayman "merely adhered to his original misdiagnosis and treatment determination." *Id*. at 207. The Court stated that it would not resurrect the last-treatment rule by adopting a continuing-wrong or continuing-treatment rule. *Id*. at 208.

Under the decision in *McKiney*, courts cannot permit a plaintiff to revive the last-treatment rule by merely pleading that the defendant had an "on-going" or "continuing" duty to act throughout the duration of the patient-physician relationship. Nevertheless, the Court in that case did not address the nature of the pleadings or proofs that would be adequate to remove the case from one pleading a continuing-wrong theory. Likewise, although the court in *McKiney* held that a plaintiff could not revive the last-treatment rule by simply pleading that his or her physician continued to adhere to a mistaken diagnosis or treatment plan throughout the duration of the patient-physician relationship, it did not foreclose the possibility that continued adherence to a particular diagnosis or treatment plan might, under the facts, constitute a discrete negligent act or omission for purposes of determining the accrual date. Therefore, we shall now turn to the nature of the pleadings and proofs that a plaintiff must allege or support with evidence in order to establish that the physician's adherence to an initial diagnosis or treatment plan constituted a discrete act or omission for purposes of establishing a later accrual date.

3. ESTABLISHING THE ACCRUAL DATE

A plaintiff must provide sufficient facts in his or her complaint to give the defendant notice of the claims against which he or she must defend: the plaintiff must provide a "statement of facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse part is called on to defend[.]" MCR 2.111(B)(1). Although there is no heightened standard of pleading for medical malpractice claims, cf. MCR 2.112(B)(1), Michigan courts have recognized that the complexity of medical malpractice litigation may require a greater degree of precision in pleading the facts constituting the claim in order to comply with the notice requirements set forth in MCR 2.111(B)(1). See *Dacon v Transue*, 441 Mich 315, 329-333; 490 NW2d 369 (1992); *Taylor v Kent Radiology, PC*, 286 Mich App 490, 507; 780 NW2d 900 (2009); *Martinez v Redford Community Hosp*, 148 Mich App 221, 230; 384 NW2d 134 (1986).

In *Dacon*, our Supreme Court explained the importance of providing the defendant physicians with sufficient notice of the acts or omissions that allegedly caused the plaintiff's injuries. In that case, Walter Dacon, as the next friend of his daughter Ericca Dacon, sued the physicians who had treated Ericca for meningitis when she was nine months old. *Dacon*, 441 Mich at 319-321. On appeal, our Supreme Court determined that the trial court did not err when it refused to allow Dacon to present evidence at trial in support of his theory that the physicians committed malpractice by delaying Ericca's treatment. *Id*. at 327-328. The Court explained that Dacon's complaint did not adequately state such a claim: "plaintiff's allegation that the defendant pediatricians did not provide 'appropriate treat-

ment and/or medication in appropriate dosage and/or duration' does not introduce any issue into the case." *Id*. at 329-330. The allegation did not "refer either specifically or generally to any facts" and "delineate[d] nothing specific about how the pediatricians erred." *Id*. at 330. That is, the allegation did not comply with MCR 2.111(B)(1) because it did not provide reasonable notice regarding any specific act or omission: "By literally alleging everything, this allegation alleges nothing." *Id*.

Thus, a plaintiff must plead facts that are sufficient to place the defendant physician on notice of the specific acts or omissions that the plaintiff believes caused his or her injuries. *Id*. Depending on the complexity of the acts or omissions at issue, this may require the plaintiff to identify with some degree of specificity how the physician breached the standard of care. See *Martinez*, 148 Mich App at 233 ("[I]t is the nature of the cause of action itself which will dictate the degree of specificity required, *i.e.*, the more complex the action, the more specific the averments should be."). In the context of a physician's continued adherence to an initial diagnosis or treatment plan after the abrogation of the last-treatment rule, it is insufficient to merely allege that the defendant breached the standard of care by continuing to adhere to the original diagnosis or treatment plan. See *McKiney*, 237 Mich App at 207. By failing to identify the facts that make the continued adherence unreasonable, see *Dacon*, 441 Mich at 330, the plaintiff reduces the claim to one alleging a continuing wrong, which the plaintiff cannot do, see *McKiney*, 237 Mich App at 207-208. In order to establish that continued adherence to an initial diagnosis or treatment plan constitutes a discrete act or omission on a date after the date when the initial diagnosis or plan was adopted, the plaintiff must plead—and be able to prove—facts that would establish that the continued adherence at

the later point constituted a breach of the duty owed to the plaintiff.

Even if a plaintiff fails to properly plead facts establishing that his or her physician's continued adherence to a diagnosis or treatment plan constituted an applicable act or omission, it must be recalled that a plaintiff may generally cure defective pleadings by amendment before trial. See MCR 2.118(A)(2); *Dacon*, 441 Mich at 333. Because a plaintiff generally has the opportunity to cure defects in his or her pleadings by amendment, it is not necessarily fatal to the plaintiff's case that he or she failed to adequately allege facts establishing that the physician's continued adherence to the diagnosis or treatment plan constituted a discrete act or omission within the period of limitations. Instead, even if the plaintiff's complaint is defective in this regard, the plaintiff may survive a properly supported motion under MCR 2.116(C)(7) by presenting evidence that establishes a question of fact about whether the physician's continued adherence constituted a breach of duty that occurred within the applicable period of limitations, see *Zwiers*, 286 Mich App at 42; *Barnard Mfg*, 285 Mich App at 374, and that, given the evidence and the case's procedural posture, the plaintiff should be entitled to cure the deficiency in the pleadings by amendment under MCR 2.118(A)(2).

With these general principles in mind, we shall now examine Kincaid's complaint and the evidence that she presented in response to Cardwell and St. Clair Cardiovascular's motion for summary disposition.

### D. APPLYING THE LAW

#### 1. THE EVIDENCE IN SUPPORT OF DISMISSAL

In her complaint, Kincaid referred to several generic acts and omissions that she alleged caused her injury;

she alleged that Cardwell and St. Clair Cardiovascular failed to "timely evaluate and treat" her, failed to "refer" her "for appropriate care and treatment," failed to warn her about the severity of her condition, failed to perform tests, failed to follow up with her, failed to notify her that they were not competent to treat her, and failed to otherwise act reasonably. She did not, however, provide any details about the acts or omissions that would relate the acts or omissions to her specific course of treatment. She also did not identify any specific dates for a particular act or omission. Rather, she described these failings as occurring in the "months leading up to [her] amputation on July 21, 2008 . . . ."

Although Kincaid did not allege facts in her complaint that would have allowed Cardwell and St. Clair Cardiovascular to identify the specific date or dates on which Kincaid believed Cardwell breached the standard of care, Cardwell and St. Clair Cardiovascular did not move for a more definite statement or to strike the pleadings. MCR 2.115. Instead, they relied on Kincaid's notice of intent to sue to establish the dates when Kincaid's claim might have accrued. Because her notice was part of her malpractice "process" or "proceeding," see *Bush v Shabahang*, 484 Mich 156, 176-177; 772 NW2d 272 (2009), and constituted other documentary evidence, MCR 2.116(G)(5), the trial court could properly consider it along with Kincaid's complaint in deciding the motion under MCR 2.116(C)(7).

In her notice, Kincaid first stated the same generic assertions that Cardwell and St. Clair Cardiovascular should have timely evaluated and treated her, should have referred her for care and treatment, and should have warned her about the severity of her condition. But she also identified specific tests that Cardwell should have performed, the point at which Cardwell

allegedly failed to properly diagnose her, and the point at which he should have warned her that he was not qualified to treat her and failed to refer her to someone who was qualified:

> No later than April 23 [sic], 2008, Dr. Cardwell was required to perform [a] lower extremity angiography, or refer the patient and make certain that she underwent [a] lower extremity angiography by a competent physician, to identify the site of the occlusion(s), any collateral circulation, possible target vessels for bypass, and visualization of run-off vessels. Dr. Cardwell was also required to conduct duplex studies to assess the caliber and patency of the patient's veins as soon as he could arrange same. Further, Dr. Cardwell was required to recognize the red flags of discoloration of her toes, re-injuries to the toes, numbness, tenderness and pain, on top of the clinical presentation including weak femoral pulses, weak pedal pulses and a hardly detectable pedal pulse on the left. No later than April 25, 2008, as soon as Dr. Cardwell learned that the patient had "potentially severe Arterial Occlusive Disease of the left lower extremity", Dr. Cardwell was required to notify the patient that she needed urgent care and treatment, and that he was not competent or qualified to treat this patient for a severe Arterial Occlusive Disease of the left lower extremity. Further, as of that date, Dr. Cardwell was required to refer the patient for appropriate care and treatment by a competent and qualified vascular or other surgeon before gangrene or ischemic necrosis occurred.[3]

In addition to the claimed acts and omissions on April 25, 2008, Kincaid alleged that Cardwell should have warned her that he was not competent to treat her condition and should have referred her to another physician on May 7, 2008. She also alleged that Card-

[3] We have quoted the ninth paragraph of § 2 from Kincaid's notice of intent to sue, which is headed "Applicable Standard of Practice." However, Kincaid used substantially the same language to describe the manner in which Cardwell breached the standard of care and the action that he should have taken to achieve compliance.

well should have informed LaMar that he could not treat Kincaid on May 7, 2008, and should have informed LaMar that Kincaid still had good blood flow to her foot.

Finally, Kincaid alleged that at "all times" Cardwell was required to notify Kincaid and LaMar that he was not competent to treat Kincaid, that an MRA revealed that Kincaid's "left . . . tibial artery" was likely occluded within the mid portion, but the "proximal portion appeared 'widely patent[']', and that the patient was a candidate for a bypass or re-vascularization." Similarly, she alleged that, at "all times," Cardwell was "required to order appropriate wound care and antibiotics for the non-healing ulcers he saw when he first met Plaintiff."

Reading Kincaid's complaint in light of her notice, it appears that the discrete acts or omissions that serve as the basis for her malpractice claims against Cardwell and St. Clair Cardiovascular occurred before June 1, 2008. Each of the dates identified by Kincaid in her notice was before June 1, 2008. Kincaid's notice shows that Cardwell's failure to properly treat and diagnose her began on her first visit to him on April 25, 2008. It was at that point that he should have first realized that he was not competent to treat her condition and should, for that reason, have referred her to a qualified physician. It was also at that point that he should have ordered the specific tests identified in Kincaid's notice. Kincaid also stated that Cardwell should have referred her to another physician and informed her and her treating physicians about his inability to treat her and about his findings to that point on May 7, 2008, which he did not do.

The general allegations that at "all times" Cardwell failed in certain regards cannot save Kincaid's claims. She alleged that Cardwell had failed to inform her that he was not qualified and failed to order proper wound

care at all times. But it was clear from her complaint that his failure to inform her and treat her wound arose on the first day of treatment and that he merely continued with this allegedly erroneous course of treatment. Merely alleging that a physician continued to adhere to a mistaken diagnosis or treatment plan at later appointments is insufficient to establish an independent act or omission on those later appointment dates. *McKiney*, 237 Mich App at 207-208. This is not to say that a physician is immunized from liability by simply adhering to a mistaken diagnosis or treatment plan at all subsequent appointments. Rather, a physician must act within the standard of care on *each* visit, and a physician's continued adherence to a particular diagnosis or treatment plan at a later appointment might constitute a breach of the standard of care if there are facts that show that continued adherence was unreasonable. Moreover, if the continued adherence to the diagnosis or treatment plan constitutes a breach of the standard of care, the plaintiff may seek redress for the harms caused by that breach as a separate claim, even if the initial adoption of the diagnosis or treatment plan was itself outside the period of limitations. In other words, the plaintiff can plead and prove that his or her physician's failure to correct the initial diagnosis or treatment plan constituted a breach of the standard of care that was distinct from the initial adoption of the diagnosis or treatment plan.[4]

[4] By way of some nonexhaustive examples, it might have been a breach of the standard of care for Cardwell to continue to adhere to an initial diagnosis or treatment plan in the face of evidence that Kincaid's symptoms had worsened or had not improved as expected under the initial treatment plan or after he received new test results. Similarly, if Cardwell failed to physically examine Kincaid at a subsequent visit and, as a result, did not have information that would have caused a reasonable physician to revise his or her diagnosis and treatment plan, the failure to conduct an examination might also constitute a distinct breach.

Here, however, Kincaid did not allege facts to establish that Cardwell breached the standard of care by continuing to adhere to an original diagnosis or treatment plan. Because Kincaid's allegations, even when viewed in the light most favorable to her, cannot be interpreted as alleging discrete acts or omissions that occurred on specific dates after his first treatment, those general allegations must be understood to refer to acts or omissions that first occurred on April 25, 2008. All later acts and omissions involving the failure to inform, refer, and treat—in the absence of more specific allegations or evidence—are simply part of Cardwell's continuing course of treatment and Kincaid could not rely on Cardwell's continuing treatment alone to establish later accrual dates. *Id*. Finally, Kincaid's allegation that at "all times" Cardwell failed to inform her or her physicians about the fact that an MRA revealed that she was a candidate for bypass also referred to an act or omission that occurred before June 1, 2008. As noted in her notice of intent to sue, Kincaid had the MRA on April 28, 2008, and her next visit with Cardwell was on May 7, 2008. Thus, Cardwell's failure to properly inform Kincaid or her physicians about the MRA arose on or before May 7, 2008.

Kincaid's complaint was so vague about the specific acts constituting malpractice (failing to treat, refer, inform, perform tests, notify, and act reasonably) and the dates that the acts occurred (referring to a period of "several months") that it arguably failed to identify any act or omission by Cardwell with sufficient specificity to permit Cardwell to offer a defense. See *Dacon*, 441 Mich at 329-330.[5] Reading Kincaid's complaint in the light

[5] As already noted, Cardwell and St. Clair Cardiovascular did not move to strike the complaint or ask for a more definite statement. See MCR 2.115. Cardwell and St. Clair Cardiovascular similarly failed to plead facts in

most favorable to her, she alleged that Cardwell breached the standard of care on the first day of treatment and that all subsequent treatment was a mere continuation of these allegedly improper acts and omissions; therefore, they could not serve as discrete acts or omissions for purposes of the accrual date. See *McKiney*, 237 Mich App at 207-208.

In contrast to her complaint, Kincaid's notice of intent to sue provided some additional details concerning the specific acts or omissions that supported her claims against Cardwell and St. Clair Cardiovascular. But, as discussed earlier, it is clear that each act or omission had to have occurred before June 1, 2008. Consequently, Cardwell and St. Clair Cardiovascular initially established that they were entitled to summary disposition under MCR 2.116(C)(7). And, as such, the burden shifted to Kincaid to show that there was—at the very least—a question of fact about whether her claims were timely. *Zwiers*, 286 Mich App at 42; *Barnard Mfg*, 285 Mich App at 374.[6]

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support of their statute of limitations defense; they merely asserted that Kincaid's complaint "may be barred in whole or part by the Statute of Limitations" without pleading any facts that, if left unrebutted, would show that Kincaid's claims were untimely. See MCR 2.111(F)(3); see also *Shank v Woodworth*, 111 Mich 642, 643; 70 NW 140 (1897) (stating that a defendant must plead the facts supporting the defendant's statute of limitations defense or it is waived); *Robinson v Emmet Co Rd Comm*, 72 Mich App 623, 641; 251 NW2d 90 (1976) ("We rule it was incumbent upon the defendant in the instant case to properly raise such a defense by pleading both the appropriate statute and the facts which indicated that the statute was applicable as a special defense which prevented recovery against this defendant."). But Kincaid did not move to strike the defense or otherwise argue that Cardwell and St. Clair Cardiovascular had waived the defense. Therefore, we have limited our analysis accordingly.

[6] Although *Barnard Mfg* concerned the shifting burden applicable to a motion for summary disposition under MCR 2.116(C)(10), we believe that this same analysis applies to factual questions involving a motion for summary disposition under MCR 2.116(C)(7).

2. KINCAID'S RESPONSE

In her reply brief, Kincaid relied in part on the very fact that her complaint was vague: "Plaintiff maintains that Defendants violated the standard of care for treatment provided several months leading up to Plaintiff's July 21, 2008 amputation . . . ." This broad reference to months, Kincaid maintained, must be interpreted in light of her recitation of the facts to conclude that each date of treatment involved separate acts and omissions. Despite attaching her medical records, letters by Cardwell concerning her treatment, and her affidavit of merit, Kincaid did not meaningfully connect the evidence to any act or omission by Cardwell that occurred on or after June 1, 2008. Rather, it was apparently her position that, because Cardwell continued to treat her after June 1, 2008, the court must assume that her allegations applied equally to each treatment date. It was not the trial court's responsibility to sift through the evidence attached to Kincaid's response to determine whether it could identify specific acts or omissions that might give rise to a later accrual date. See *Barnard Mfg*, 285 Mich App at 377-379. Rather, Kincaid had the burden of bringing forth evidence to contradict the evidence presented by Cardwell and St. Clair Cardiovascular to establish a question of fact about whether her claims were timely filed. This she did not do. By failing to identify the specific negligent acts or omissions that occurred during the June 6, June 16, or July 9, 2008, appointments, Kincaid was left relying on Cardwell's continued treatment to establish new accrual dates on each appointment after the first, which she could not do. See *McKiney*, 237 Mich App at 207-208.

Kincaid's lawyer did make a belated effort to correct these deficiencies at oral argument on the summary

disposition motion; it was then that Kincaid's lawyer first alleged that Cardwell's continued adherence to a mistaken diagnosis constituted a breach of the standard of care. Kincaid's lawyer began by distinguishing the facts in *McKiney* from Kincaid's case; she explained that in *McKiney*, the plaintiff did not present any evidence that there were new symptoms that gave rise to a new duty:

> There was nothing new presented. There was no new diagnosis that he was giving. Conversely in our case here each time the -- each time Plaintiff presented to the Doctor's officer she was showing a worsening symptom. So the first time she presented, yes, she had discoloration of the -- in her toes and they had did [sic] all these tests, et cetera. The next time she presented she had further discoloration of the toes. They were doing the femoral pulses. One time she had [a] femoral pulse in the left leg. Next time they had the femoral pulse but there was no pedal/push action. Then you keep going to June 6th and then June 16th she's worsening in her discomfort. She's worsening in her presentment. She's getting gangrene in the toes and still the Defendant, the Defendant Doctor did not refer her out and did not -- failed to diagnose that she had a serious problem with her foot.

In reviewing a motion for summary disposition, this Court must determine whether the trial court erred on the basis of the arguments and evidence properly presented to the trial court. *Barnard Mfg*, 285 Mich App at 380-381. Although Kincaid's brief continued to assert claims that amounted to a continuing wrong, she could have remedied that defect at oral arguments by showing that there was evidence that established a discrete negligent act or omission on a later date. See *id*. at 380 (noting that the parties may bring to the trial court's attention evidence that is contained in the record in their briefs or *orally* at the motion hearing). And Kincaid's lawyer tried to do just that; she argued that

Cardwell committed an act or omission giving rise to liability by adhering to his initial diagnosis or treatment plan despite evidence that Kincaid's condition had worsened. The evidence that Kincaid's condition was progressively worsening, she maintained, gave rise to an independent duty to reevaluate his diagnosis and presumably adopt new treatments for Kincaid's condition or to refer Kincaid to another physician. However, Kincaid's lawyer only generally referred to the record evidence; she did not identify specific pieces of evidence that showed that Kincaid's condition had worsened and did not identify the evidence that showed that a physician in Cardwell's position would have revised his or her diagnosis or treatment plan in light of Kincaid's condition on the later appointment dates. In the absence of such evidence, Kincaid was left with her claim that Cardwell breached the standard of care by continuing to adhere to his initial diagnosis and treatment plan; however, Cardwell's continued adherence was by itself insufficient to establish a question of fact about whether he committed an act or omission on or after June 1, 2008. *McKiney*, 237 Mich App at 207-208.

## III. CONCLUSION

Kincaid did not allege facts in her pleadings that adequately placed Cardwell and St. Clair Cardiovascular on notice of any acts or omissions that occurred on or after June 1, 2008, that might have given rise to liability. As such, her claims were untimely on the face of her pleadings. Moreover, in response to Cardwell and St. Clair Cardiovascular's properly supported motion for summary disposition under MCR 2.116(C)(7), Kincaid failed to present evidence to establish a question of fact about whether Cardwell committed an act or omission on or after June 1, 2008. Therefore, the trial

court did not err when it concluded that, under the undisputed facts, Kincaid's claims were untimely and should be dismissed under MCR 2.116(C)(7).

Affirmed. As the prevailing parties, Cardwell and St. Clair Cardiovascular may tax their costs. MCR 7.219(A).

FITZGERALD, P.J., and METER, J., concurred with M. J. KELLY, JJ.

DUFFY v IRONS AREA TOURIST ASSOCIATION

Docket Nos. 309003, 311023. Submitted April 3, 2013, at Lansing. Decided April 18, 2013, at 9:05 a.m.

Beverly and Daniel Duffy brought an action in the Lake Circuit Court against the Irons Area Tourist Association and the Cycle Conservation Club of Michigan, seeking damages for injuries sustained by Beverly Duffy while driving an all-terrain vehicle on a portion of the Little Manistee Trail located on state land. Plaintiffs alleged that the state had contracted with defendants to grade and maintain the portion of the trail where the accident occurred and that defendants, as a result of their negligent failure to properly maintain the trail, were responsible for Beverly's crash and injuries. The Tourist Association moved for summary disposition, alleging that its maintenance of the trail fell under the provisions of the recreational land use act, MCL 324.73301, that limit liability to situations involving gross negligence. The court, Mark S. Wickens, J., agreed with the Tourist Association and on February 8, 2012, issued an opinion that stated that the court was granting the Tourist Association's motion. On February 14, 2012, the court entered a stipulated order dismissing plaintiffs' claim against the Conservation Club. Plaintiffs appealed (Docket No. 309003). Because the trial court had not yet entered its order dismissing the claim against the Tourist Association, it entered the order on June 6, 2012. Plaintiffs appealed that order as well (Docket No. 311023). The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. The Legislature plainly intended to limit the scope of the protection provided under the recreational land use act, MCL 324.73301, to the owner, tenant, or lessee of the land. The act provides that a land owner, tenant, or lessee cannot be liable unless the land owner, tenant, or lessee engaged in gross negligence or willful and wanton misconduct. The Legislature extended the protections of the act to land owners, tenants, and lessees because it is those persons or entities whose possession and control over the land renders them liable under the traditional common-law principles applicable to premises liability. Therefore, the

protections afforded by MCL 324.73301 apply only to the traditional premises possessors identified by the Legislature in the act: land owners, tenants, and lessees.

2. The recreational land use act should be enforced as written and not given a judicial gloss designed to promote what the court believes to be the Legislature's policy goal in enacting the act.

3. There is no evidence that the Department of Natural Resources transferred an ownership interest in, or exclusive possession and control over, the land at issue to the Tourist Association. The Tourist Association was not an owner, tenant, or lessee of the land at issue. The trial court erred by extending the scope of the recreational land use act to protect the Tourist Association and by dismissing plaintiffs' claim against the Tourist Association on that basis. Because plaintiffs did not have to plead and prove that Beverly Duffy's injuries arose from the Tourist Association's gross negligence or willful and wanton misconduct, the trial court erred by granting summary disposition in favor of the Tourist Association on the basis of plaintiffs' failure to establish gross negligence. The opinion and order granting summary disposition in favor of the Tourist Association is vacated and the case is remanded for further proceedings consistent with the opinion of the Court of Appeals.

Vacated and remanded.

NEGLIGENCE — POSSESSORS OF LAND — RECREATIONAL LAND USE ACT.

The protections afforded by the recreational land use act apply only to the traditional premises possessors identified by the Legislature in the act: land owners, tenants, and lessees; the Legislature extended such protections to land owners, tenants, and lessees because it is those persons or entities whose possession and control over the land renders them liable under the traditional common-law principles applicable to premises liability (MCL 324.73301).

*Boyer, Dawson & St. Pierre, PLLC* (by *William G. Boyer, Jr.*), and *Mark G. Butler* for Beverly and Daniel Duffy.

*Smith Haughey Rice & Roegge* (by *William L. Henn* and *Todd W. Millar*) for Irons Area Tourist Association.

Before: M. J. KELLY, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM. In this suit to recover for personal injuries allegedly caused by the failure to properly maintain a public trail, plaintiffs, Beverly and Daniel Duffy (collectively the Duffys), appeal as of right the trial court's order granting summary disposition in favor of defendant Irons Area Tourist Association. On appeal, we must determine whether the trial court erred when it determined that the Tourist Association was protected from liability under Part 733 of the Natural Resources and Environmental Protection Act, see MCL 324.73301, which is commonly referred to as the recreational land use act. Because we conclude that the trial court erred when it relied on that act in dismissing the Duffys' claim against the Tourist Association, we vacate and remand.

## I. BASIC FACTS

In September 2007, Beverly Duffy drove an all-terrain vehicle on a portion of the Little Manistee Trail located on state land. After she crossed over some partially buried wooden boards on the trail, she lost control of her vehicle and crashed. She suffered serious spinal cord injuries and paralysis. The Duffys eventually sued the Tourist Association and defendant Cycle Conservation Club of Michigan. Specifically, they alleged that the state of Michigan had contracted with the Tourist Association and the Conservation Club to grade and maintain the trail in question and, as a result of their negligent failure to properly maintain the trail, the Tourist Association and the Conservation Club were responsible for Beverly Duffy's crash and injuries.

In lieu of an answer, the Tourist Association moved for summary disposition under MCR 2.116(C)(8) and (10). It argued that it was entitled to summary disposition because its maintenance of the trail fell under the

recreational land use act, which limited liability to situations involving gross negligence. The Tourist Association asserted that it was entitled to have the Duffys' claim dismissed because the Duffys had not properly alleged that the Tourist Association's maintenance of the trail was grossly negligent and, in any event, could not prove gross negligence. The trial court agreed and, on February 8, 2012, it issued an opinion stating that it was granting the Tourist Association's motion.

On February 14, 2012, the trial court entered a stipulated order to dismiss the Duffys' claim against the Conservation Club. After the Conservation Club's dismissal, the Duffys appealed and this Court assigned Docket No. 309003 to the appeal. However, the trial court had not yet entered an order dismissing the Duffys' claim against the Tourist Association; it did not enter such an order until June 6, 2012. The Duffys appealed that order as well and this Court assigned Docket No. 311023 to that appeal. This Court then consolidated the appeals.

## II. SUMMARY DISPOSITION

### A. STANDARD OF REVIEW

The Duffys first argue that the trial court erred when it determined that the Tourist Association was entitled to the protection provided under the recreational land use act. Because that act did not apply to the Tourist Association, they maintain, the trial court erred when it dismissed their claim against the Tourist Association on the basis that they failed to plead and establish that the Tourist Association's acts or omissions amounted to gross negligence. This Court reviews de novo a trial court's decision on a motion for summary disposition.

*Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of statutes, *Neal v Wilkes*, 470 Mich 661, 664; 685 NW2d 648 (2004), and agreements, *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

B. THE RECREATIONAL LAND USE ACT

In 1995, the Legislature enacted the recreational land use act. See 1995 PA 58. The recreational land use act modified the common law applicable to torts involving injuries that a person sustained while on "the land of another" for recreational purposes:

> Except as otherwise provided in this section, a cause of action shall not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee. [MCL 324.73301(1).]

By repeatedly referring to the owner, tenant, or lessee of the land on which the person is injured, the Legislature plainly intended to limit the scope of the protection provided under MCL 324.73301(1): "a cause of action" by persons who were injured "on the land of another"—without paying to "*the* owner, tenant, or lessee of the land" a valuable consideration—shall not arise "against *the* owner, tenant, or lessee of the land" unless that person's injuries were caused "by the gross negligence or willful and wanton misconduct *of the owner, tenant, or lessee*." *Id*. (emphases added). The

Legislature provided similar protections to owners, tenants, and lessees who permit the general public to use their land "for the purpose of entering or exiting from or using" a Michigan trailway or public trail, or to use their land for certain agricultural purposes. MCL 324.73301(2)-(5). As can be seen from a cursory reading, the Legislature took pains to state that it is the land owners, tenants, or lessees who cannot be liable unless the land owner, tenant, or lessee engaged in gross negligence or wanton and willful misconduct. It is also evident that the Legislature extended this protection to owners, tenants, and lessees because it is those persons or entities whose possession and control over the land renders them liable under the traditional common-law principles applicable to premises liability. See *Merritt v Nickelson*, 407 Mich 544, 552-554; 287 NW2d 178 (1980) (stating that premises liability "is conditioned upon the presence of both possession and control over the land" and holding that a coowner who does not have such possession and control is not liable); see also *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 265-269; 235 NW2d 732 (1975) (explaining that a lessee generally assumes responsibility for the condition of those parts of the premises over which the lessee has possession and control); *Ann Arbor Tenants Union v Ann Arbor YMCA*, 229 Mich App 431, 443-444; 581 NW2d 794 (1998) (stating that the defining characteristic of a tenant—as opposed to a guest—is that the tenant obtains exclusive legal possession and control over the premises during the term of a leasehold). Accordingly, we hold that the protections afforded by MCL 324.73301 apply only to the traditional premises possessors identified by the Legislature in that statute: landowners, tenants, and lessees.

Relying on *Kruse v Iron Range Snowmobile Club*, 890 F Supp 681, 684-685 (WD Mich, 1995), the trial court

determined that the recreational land use act should be extended to protect the Tourist Association. In *Kruse*, the court determined that the recreational land use act applied to an entity that contractually agreed to groom trails even though the entity did not own or lease the land at issue. *Id*. at 685. The court concluded that it would be appropriate to apply the act to the entity because it had been given the right to exercise "substantial ongoing control upon the land" and because extending the act would further the Legislature's purpose in enacting the act. *Id*. ("To deny the Snowmobile Club the Act's immunity simply because it does not appear to be an owner, tenant or lessee under traditional notions would be to exalt the importance of the defendant's relationship to the land in a manner disfavored by the Michigan courts."). But our Supreme Court has disavowed this type of "legislative decision-making" by the courts when interpreting the recreational land use act. *Neal*, 470 Mich at 667. Instead, our Supreme Court has held that the recreational land use act should be enforced *as written* and not given a judicial gloss designed to promote what the court believes to be the Legislature's policy goal in enacting the statute. *Id*. at 665-667, overruling *Wymer v Holmes*, 429 Mich 66; 412 NW2d 213 (1987).

The court in *Kruse* also relied on *Wilson v Thomas L McNamara, Inc*, 173 Mich App 372, 377; 433 NW2d 851 (1988), for the proposition that the defendant's relationship to the land does not really matter in determining whether the act applies. *Kruse*, 890 F Supp at 685. We disagree that *Wilson* stands for that proposition. Relying on the since overruled decision in *Wymer*, the Court in *Wilson* emphasized that it was the character of the land that determined whether the recreational land use act applied and not the nature of the defendant's relationship to the land; it nevertheless recognized that

whether "or not one is the 'owner, tenant, or lessee' of the lands relates to the issue of whether one is a proper defendant in the action." *Wilson*, 173 Mich App at 377. That is, the Court recognized that a person or entity is *not* a proper defendant in a premises liability action if the person or entity is not an owner, lessee, or tenant of the land at issue. In any event, even if *Wilson* could be interpreted to extend the recreational land use act to persons or entities other than owners, lessees, or tenants, we would decline to follow it as unpersuasive and directly contradicted by the language of the statute. See MCR 7.215(J)(1). The Legislature limited the recreational land use act's protection to land owners, tenants, and lessees, and we must enforce that limitation. *See Johnson v Recca*, 492 Mich 169, 196-197; 821 NW2d 520 (2012) (stating that a court should not try to enhance or improve statutes to fit what the court believes is the better policy choice, but must instead rest its analysis on the actual language and organization of the statute).

Here, the undisputed evidence showed that the Tourist Association entered into a "grant agreement" with the Department of Natural Resources. Under the terms of that agreement, the Tourist Association agreed to make certain improvements to the trail at issue in exchange for grant disbursements from the Department. There is no evidence, however, that the Department transferred an ownership interest in, or exclusive possession and control over, the land at issue to the Tourist Association; therefore, the Tourist Association was not an owner, tenant, or lessee. *Merritt*, 407 Mich at 552; *Quinlivan*, 395 Mich at 269; *Ann Arbor Tenants Union*, 229 Mich App at 443-444. Because the undisputed evidence showed that the Tourist Association was not the owner, tenant, or lessee of the land upon which Beverly Duffy was injured, the trial court erred when it

extended the scope of the recreational land use act to protect the Tourist Association and dismissed the Duffys' claim against it on that basis. MCL 324.73301.

## III. CONCLUSION

The Tourist Association was not an owner, tenant, or lessee of the land; as such, the recreational land use act did not apply to the Tourist Association and the trial court erred when it concluded otherwise. Because the Duffys did not have to plead and prove that Beverly Duffy's injuries arose from the Tourist Association's gross negligence or willful and wanton misconduct, the trial court erred when it granted the Tourist Association's motion for summary disposition on the ground that the Duffys failed to plead or present evidence to establish gross negligence. For these reasons, we vacate its opinion and order granting summary disposition in favor of the Tourist Association and remand for further proceedings consistent with this opinion. Given our resolution of this issue, we decline to consider the Duffys' remaining claims of error.

Vacated and remanded for further proceedings. We do not retain jurisdiction. As the prevailing party, the Duffys may tax their costs. MCR 7.219(A).

M. J. KELLY, P.J., and CAVANAGH and MURRAY, JJ., concurred.

MICHIGAN ASSOCIATION OF CHIROPRACTORS v BLUE CROSS BLUE SHIELD OF MICHIGAN

Docket No. 304736. Submitted February 12, 2013, at Lansing. Decided April 18, 2013, at 9:10 a.m. Leave to appeal sought.

The Michigan Association of Chiropractors (MAC) and Toby A. Mitchell, D.C., brought an action in the Ingham Circuit Court against Blue Cross Blue Shield of Michigan (BCBSM), alleging that BCBSM, a nonprofit health care corporation that insures prepaid health care for members of the general public, breached contracts with MAC members who contracted with BCBSM to provide chiropractic services (provider agreements) and a 1999 settlement agreement between MAC's predecessor organizations and BCBSM to resolve disputes regarding the provider agreements, and also violated state law. Plaintiffs alleged that BCBSM had a practice of not paying chiropractic providers for covered chiropractic services, while it pays other nonchiropractic providers for providing the same services. Plaintiffs also alleged that MAC members who are not participating providers have suffered damages as a result of being discouraged from becoming BCBSM providers because of the policies. Count I of the complaint alleged that BCBSM had met often with MAC in a "sham" attempt to implement proper reimbursement policies and sought compensatory and exemplary damages for the intentional representations and promises of performance that BCBSM allegedly made with no intention of following through, to the detriment of the relationships between MAC members and their patients. Count I did not, however, seek declaratory relief. Count II alleged that BCBSM breached the 1999 settlement agreement by unilaterally requiring traction to be linked to a chiropractic adjustment and by ceasing to use the charging code for emergency services. Count II sought a declaratory judgment that BCBSM breached the 1999 settlement agreement as well as damages, fees, and costs. Count III alleged that BCBSM's refusal to reimburse practitioners "for physical medicine modalities it recognizes are within the scope of chiropractic" constituted a breach of certain provider agreements that the 1999 settlement agreement allegedly does not apply to. Count III sought declaratory relief and an award of damages. Plaintiff moved to certify a class comprising of "all similarly situated

chiropractors who have or had Traditional Services or PPO Product Agreements with Blue Cross, are members of the MAC and have been denied lawful reimbursement." BCBSM denied that it breached the 1999 settlement agreement and opposed the motion to certify the class. The court, Paula J. M. Manderfield, J., determined that the requirements of MCR 3.501(A)(1) for class certification were satisfied and certified the class. BCBSM sought leave to appeal. The Court of Appeals granted leave to appeal. *Chiropractors Ass'n of MI v Blue Cross/Blue Shield of MI*, unpublished order of the Court of Appeals, entered February 22, 2012 (Docket No. 304736).

The Court of Appeals *held*:

1. An action must meet all the requirements of MCR 3.501(A)(1) to proceed as a class action.

2. The initial inquiry in this case—whether BCBSM's conduct was contrary to law or contractual terms–does not require the examination of individual cases.

3. For count II, and for count I if plaintiffs are able to amend their complaint on remand to seek declaratory relief in count I, the proposed class definition does not pose an obstacle to certification for any declaratory relief plaintiffs seek. If BCBSM had a duty to negotiate in good faith but in fact was merely intentionally causing delay, and if MAC and its members waited for these negotiations to conclude despite an exodus of patients to doctors offering more services that were covered, the legal issues and factual matters other than damages would apply class-wide. Likewise, the question whether BCBSM unilaterally implemented across-the-board policies that breached the settlement agreement involves common legal and factual questions.

4. There is no overarching legal question to be addressed with regard to count III because, in each case, whether reimbursement was wrongfully denied hinges on whether "covered services" were provided. Therefore, for count III, the proposed class definition is not supported by the record at this point because there is no evidence that count III does not require an examination of each certificate involved in every challenged reimbursement denial. The trial court erred by certifying the class with regard to count III because the commonality requirement for class certification was not met.

5. A problem does arise to the extent that plaintiffs seek compensatory and exemplary damages. Establishing that a patient left someone's practice because of BCBSM's delay requires an individual examination of facts. Whether a practitioner is entitled to compensatory damages requires an examination of claims

submitted and denied, or services provided and not reimbursed by BCBSM. Like with count III, this would require an examination of each patient's certificate to see if the denied claim was for a covered service.

6. There is no need to decertify the class on the basis of the definition of the class. However, the record does not support the proposed class definition with regard to count III. Plaintiffs' claims for declaratory relief are to be bifurcated from those seeking retrospective compensatory damages. The class definition is valid for the declaratory relief plaintiffs seek in count II, and for count I if plaintiffs are able to amend their complaint on remand to seek declaratory relief in that count.

7. The trial court erred by holding that plaintiffs satisfied the numerosity requirement for class certification after only considering the evidence of the number of chiropractors holding contracts with BCBSM. Reversal is not warranted on this basis because, as a result of the Court of Appeals limiting of plaintiffs' remedies to declaratory relief, the need to estimate the number of chiropractors suffering actual financial harm was deemphasized. On remand, the trial court must require plaintiffs to provide an actual estimate of the number of chiropractors that meet the third element of the class definition—they have been wrongfully denied reimbursement—before plaintiffs may proceed with the damages portion of their suit.

8. The counts involving misrepresentation during negotiations (count I) and unilateral changes in reimbursement codes (count II) involve common questions.

9. Count III is not suitable for class certification because of the individualized inquiry that is required for each class member.

10. To the extent that the trial court's order failed to recognize the individual inquiry needed for resolution of count III, the court erred by certifying the class for the entire complaint.

11. The adequacy element is sufficiently met for counts I and II, but not for count III. Dr. Mitchell is not an adequate representative for count III because he failed to establish that he exhausted his contractual remedies.

12. Plaintiffs failed to establish that their claims for compensatory relief satisfy the class action requirements set out in MCR 3.501(A)(1). The trial court should have bifurcated the declaratory claims for count II and certified the class for that count. If plaintiffs fail to seek to amend their complaint on remand, count I should be decertified in its entirety. If plaintiffs are able to amend their complaint on remand to seek declaratory relief in count I, the

trial court should bifurcate the declaratory relief claims and also certify the class for count I. Because of the unsuitability of the compensatory relief sought and the failure of plaintiffs to establish commonality, typically, and adequacy for count III, the trial court abused its discretion by allowing certification of the class for plaintiffs' entire complaint.

Affirmed in part, reversed in part, and remanded.

1. ACTIONS — CLASS ACTIONS — MOTIONS TO CERTIFY CLASS ACTIONS — PREREQUISITES FOR CLASS CERTIFICATION — BURDEN OF PROOF.

The burden of establishing that the requirements for a certifiable class are satisfied is on the party seeking certification; all the requirements for certification stated in MCR 3.501(A)(1) must be met before an action may proceed as a class action; the requirements pertain to numerosity (the class is so numerous that joinder of all members is impracticable), commonality (there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members), typicality (the claims or defenses of the representative parties are typical of the claims or defenses of the class), adequacy (the representative parties will fairly and adequately assert and protect the interests of the class), and superiority (the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice); a court may not simply accept as true a party's bare statement that a prerequisite has been met without making an independent determination that basic facts and law are stated adequately to support that prerequisite.

2. ACTIONS — CLASS ACTIONS — NUMEROSITY OF PLAINTIFFS.

There is no particular minimum number of members necessary to meet the numerosity requirement for certifying an action as a class action; the exact number of members need not be known as long as general knowledge and common sense indicate that the class is large; the plaintiff must adequately define the class so potential members can be identified and must present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members because the court cannot determine if joinder of the class members would be impracticable unless it knows the approximate number of members (MCR 3.501[A][1]).

3. ACTIONS — CLASS ACTIONS.

A person generally may not pursue a cause of action in a class that the person could not pursue individually.

*Miller, Canfield, Paddock and Stone, P.L.C.* (by *Richard A. Gaffin* and *Kenneth T. Brooks*), for plaintiffs.

*Dickinson Wright PLLC* (by *Joseph A. Fink*, *Jeffery V. Stuckey*, and *Scott R. Knapp*) and *Nicole M. Wotlinski* for defendant.

Before: FITZGERALD, P.J., and METER and M. J. KELLY, JJ.

FITZGERALD, P.J. Defendant, Blue Cross Blue Shield of Michigan (BCBSM), appeals by leave granted the trial court's order granting the motion of plaintiffs, Michigan Association of Chiropractors (MAC), also known as the Chiropractic Association of Michigan, and Toby A. Mitchell, D.C., for class certification. This case was submitted and argued with *Mich Ass'n of Chiropractors v Blue Care Network of Mich, Inc*, 300 Mich App 577; ___ NW2d ___ (2013). Defendant here asserts that plaintiffs' proposed class was improperly certified because the class definition is fundamentally flawed and because plaintiffs have not satisfied the requirements of MCR 3.501(A)(1). For the reasons given hereinafter, we affirm in part, reverse in part, and remand for further proceedings.

## I. BACKGROUND

The complaint in this case alleges that MAC is a voluntary trade association representing the interests of approximately 1,400 chiropractic doctors in Michigan. Dr. Mitchell is a licensed chiropractic physician, a member of MAC, and an affiliated provider with BCBSM. BCBSM is a nonprofit health care corporation that insures prepaid health care for members of the general public. Seventy percent of MAC members are members of BCBSM's chiropractic provider network; in

addition, some MAC members were BCBSM providers in the past, but are not currently providers, and some have never been providers.

MAC members who are providers contract with BCBSM to provide chiropractic services under Practitioner Traditional Participation Agreements and PPO TRUST Network Practitioner Affiliation Agreements (TRUST agreements) (together, "the provider agreements"). The terms of the provider agreements are the same for all providers. Additionally, in 1999, MAC's predecessor organizations and BCBSM entered into a settlement agreement resolving their disputes over the "administration and implementation" of the provider agreements. At issue in this case is the administration and interpretation of the 1999 settlement agreement in conjunction with the provider agreements.

## II. THE COMPLAINT AND PROPOSED CLASS

In their amended complaint, plaintiffs alleged that BCBSM breached the provider agreements and the 1999 settlement agreement and violated Michigan law. Plaintiffs claimed that BCBSM has a practice of not paying chiropractic providers for covered chiropractic services, while it pays other nonchiropractic providers for providing the same services. Plaintiffs also alleged that MAC members who are not participating providers have suffered damages because they have been discouraged from becoming BCBSM providers as a result of these policies. The complaint stated three counts. Count I alleged that BCBSM had met often with MAC in a sham attempt to implement "proper reimbursement policies," and sought

> compensatory and exemplary damages for the intentional manner in which Blue Cross and Blue Shield made representations and promises of performance to Plaintiffs, with

> no intention of following through, to the detriment of Plaintiffs' patient relationships, and instead simply forestalled implementation of any appropriate changes until Plaintiffs should file this lawsuit.

Count I did not, however, seek declaratory relief. Count II alleged two ways BCBSM breached the 1999 settlement agreement—by unilaterally requiring traction to be linked to a chiropractic adjustment and by ceasing to use the charging CPT[1] code for emergency services—and sought a declaratory judgment that BCBSM breached the 1999 settlement agreement as well as damages, fees, and costs. Count III alleged that BCBSM's refusal to reimburse practitioners "for physical medicine modalities it recognizes are within the scope of chiropractic" constituted a breach of the TRUST agreements (plaintiffs asserted that the 1999 settlement agreement does not apply to the TRUST agreements) and sought declaratory relief and damages.

Plaintiffs moved to certify a class comprised of "all similarly situated chiropractors who have or had Traditional Services or PPO Product Agreements with Blue Cross, are members of the MAC and have been denied lawful reimbursement." In support of the motion, plaintiffs offered the affidavit of Kristine Dowell, director of MAC, describing the history of the relationship between MAC and BCBSM, the history of negotiations, and her knowledge of defendant's practices that have affected chiropractors. Plaintiffs also provided Dr. Toby Mitchell's affidavit attesting to the harms that he suffered. He averred that despite his provider agreements, BCBSM "continually refuses to reimburse me for services that those agreements require it to reimburse for" and, be-

[1] CPT is an acronym for Current Procedural Terminology, which is the American Medical Association's "official coding resource for procedural codes, rules and guidelines."

cause BCBSM does reimburse other providers, such as osteopaths, for those services, Dr. Mitchell would "often lose patients because they do not wish to pay for their treatment out of pocket . . . ." He stated that he sometimes did not submit invoices that he knew would be rejected, and he identified CPT codes for which reimbursement was not allowed, eliminated over time, or provided on a limited basis. Dr. Mitchell asserted that he lost patients and suffered financial loss as a result of BCBSM's policies.

Defendant asserted that the 1999 settlement agreement controls which services are reimbursed and that it had not breached that agreement. The provider agreements limit reimbursement to services identified as "covered" in an insured's certificate, and none of those certificates expands covered chiropractic services to everything a chiropractor is licensed to perform. Regarding class certification, defendant argued that the class definition was too broad, that plaintiffs failed to identify any actual damages that had been incurred as a result of the alleged breaches, that plaintiffs failed to provide a method to identify class members, that the court would have to conduct exhaustive evidentiary hearings to determine whether individual chiropractors should be included in the class, and that Dr. Mitchell was not representative of any class because his claims were time-barred. Notably, defendant did not dispute that class litigation was suitable for the prospective or declaratory aspects of the claims.

The trial court disagreed with defendant and, in a written opinion, held that the requirements of MCR 3.501(A)(1) were satisfied. Thereafter, it certified the class. Defendant sought leave to appeal, which we granted, limited to the issues raised in the application.[2]

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[2] *Chiropractors Ass'n of MI v Blue Cross/Blue Shield of MI*, unpublished order of the Court of Appeals, entered February 22, 2012 (Docket No. 304736).

## III. STANDARD OF REVIEW

Interpretation of MCR 3.501(A) presents a question of law that we review de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). The analysis a court must undertake regarding class certification may involve making both factual findings and discretionary decisions. *Id*. at 495-496. We review the trial court's factual findings for clear error and the decisions that are within the trial court's discretion for an abuse of discretion. *Id*. The burden of establishing that the requirements for a certifiable class are satisfied is on the party seeking to maintain the certification. *Tinman v Blue Cross & Blue Shield of Mich*, 264 Mich App 546, 562; 692 NW2d 58 (2004); see also *Henry*, 484 Mich at 509.

## IV. MCR 3.501(A)(1)

Certification of a class is controlled by court rule. Under MCR 3.501(A)(1), one or more members of a purported class may file suit on behalf of all members only if:

> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

These prerequisites are often referred to as numerosity, commonality, typicality, adequacy, and superiority. *Henry*, 484 Mich at 488. "[T]he action must meet *all* the requirements in MCR 3.501(A)(1); a case cannot proceed as a class action when it satisfies only some, or even most, of these factors." *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 597; 654 NW2d 572 (2002).

Although the federal " 'rigorous analysis' " approach does not apply under our state law, "a certifying court may not simply 'rubber stamp' a party's allegations that the class certification prerequisites are met." *Henry*, 484 Mich at 502. The court's decision to certify may be based on the pleadings alone only if the averments therein satisfy the party's burden of proving that the requirements of MCR 3.501 are met, "such as in cases where the facts necessary to support this finding are uncontested or admitted by the opposing party." *Henry*, 484 Mich at 502-503. The court "may not simply accept as true a party's bare statement that a prerequisite is met" without making an independent determination that basic facts and law are stated adequately to support that prerequisite. *Id*. at 505. "If the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper." *Id*. at 503. The court should analyze asserted facts, claims, defenses, and relevant law, but "should avoid making determinations on the merits of the underlying claims at the class certification stage of the proceedings." *Id*. at 488; see also *id*. at 504.

Precedential caselaw on the subject of certification is thin in Michigan. *Henry*, the lead case in Michigan on class certification, involved allegations that the defendant, Dow Chemical Company, had negligently released

dioxin into the Tittabawassee River. The plaintiffs sought certification of a class of "persons owning real property within the 100-year flood plain of the Tittabawassee River on February 1, 2002," estimated by the plaintiffs to consist of approximately 2,000 persons. *Id*. at 491. The trial court held a two-day hearing in which it reviewed numerous scientific studies, affidavits from experts, and state-agency-provided information from both parties. The Michigan Supreme Court concluded that, although the trial court's analyses of the prerequisites identified in MCR 3.501(A)(1)(a), (b), and (e) were sufficient, the record was insufficient to determine if the trial court had made a valid, independent determination regarding the typicality and adequacy prerequisites of MCR 3.501(A)(1)(c) and (d). *Henry*, 484 Mich at 506. Accordingly, the case was remanded for clarification of the trial court's analysis of those two prerequisites. *Id*. at 509. Thus, although *Henry* sets out the details of the proper test under the court rule, it provides little guidance in applying the prerequisites.

## V. CLASS DEFINITION

Defendant first argues that the proposed class is unsuitable for certification because the class definition requires a determination of the merits of each individual claimant's case. That is, defendant asserts first that the only way to determine who is a class member is to identify chiropractors who are current MAC members, have signed BCBSM participation agreements, and were denied lawful reimbursement by BCBSM and second that this last requirement mandates an individualized factual inquiry, something that is not proper for class certification. Defendant relies on *Tinman*, 264 Mich App 546, arguing that the class sought here is

analogous to the class this Court decertified in that case. The *Tinman* class was defined as:

> "[A]ll persons who, during the period from June 9, 1998, through the present, were, are and will be entitled to receive health care benefits from Blue Cross & Blue Shield of Michigan (BCBSM) for emergency health care services, but were, or will be, denied health care benefits for emergency health care services by BCBSM based on the final diagnosis of their medical condition (excluding any officers or directors of BCBSM, and their family members)." [*Id.* at 552-553.]

The trial court in *Tinman* had found that the predominant issue was whether BCBSM's " 'systematic practice' " of denial on the basis of the final diagnosis of a medical condition violated statutory law and the certificates it issued and that this was a common question of fact and law meeting the requirements of MCR 3.501(A)(1)(b). *Tinman*, 264 Mich App at 563. This Court disagreed, concluding:

> Rather than being subject to generalized proofs, the evidence of the type of emergency health services and medically necessary services provided, the medical conditions involved and whether they occurred suddenly, the signs and symptoms that manifested those medical conditions, and whether payment was denied for services up to the point of stabilization will all vary from claimant to claimant. Thus, it is evident that to determine defendant's liability, highly individualized inquiries regarding the circumstances relevant to each claim clearly predominate over the more broadly stated common question in this case. [*Id.* at 564-565.]

Defendant asserts that what plaintiffs seek here is no different from what was sought in *Tinman* because each request for reimbursement must be for medically necessary services, i.e., the entitlement to reimbursement depends on individual assessments. However,

rather than viewing defendant's conduct as resulting from a series of individual decisions, defendant's conduct can be viewed as showing that it adhered to specific policies that affected many providers in the same way. The initial inquiry—whether defendant's conduct was contrary to law or contractual terms—does not require the examination of individual cases.

An examination of each count provides a clearer picture of the issue. In count I, plaintiffs alleged that, after the 1999 settlement agreement was signed, defendant engaged in a course of fraudulent conduct in the "free and open" meetings between MAC and BCBSM at which they discussed "CPT codes that would be payable." Defendant allegedly agreed with MAC about which codes were within the scope of chiropractic, and "made numerous representations about essentially providing reimbursement for the additional services identified," but had no intention of actually allowing that level of reimbursement. Instead, it intentionally caused plaintiffs to rely on defendant's apparent good faith and to forgo legal action for as long as it could delay.

The allegations of count II are similar. In this count, plaintiffs alleged that defendant breached the 1999 settlement agreement by unilaterally implementing policies to the detriment of its chiropractic physicians who provide care pursuant to Traditional Services Agreements. Specifically, contrary to the terms of the settlement agreement, defendant allegedly stopped paying for mechanical traction unless it was performed in conjunction with an adjustment, and defendant stopped using CPT code 99058, which took away "the only means for chiropractic physicians to be paid additional office visits for established patients when they presented with an additional condition that required evaluation and management services."

Count III applies only to providers with whom defendant has TRUST agreements. In this count, plaintiffs alleged that defendant refused to reimburse those providers for all but one of the CPT codes that represent services chiropractors are licensed to perform and that this refusal violated the TRUST agreements.

We conclude that for count II, and for count I if plaintiffs are able to amend their complaint on remand to seek declaratory relief in that count, the proposed class definition does not pose an obstacle to certification for any declaratory relief plaintiffs seek. If defendant had a duty to negotiate in good faith but in fact was merely intentionally causing delay, and if MAC and its members waited for those negotiations to conclude despite an exodus of patients to doctors offering more services that were covered, the legal issues (such as whether defendant had such a duty) and factual matters other than damages (such as when MAC would have taken action) would apply class-wide. Likewise, the question whether defendant unilaterally implemented across-the-board policies that breached the 1999 settlement agreement involves common legal and factual questions. It does not take an assessment of each individual in the class to show that elimination of the only way to get reimbursement for a procedure plaintiffs normally performed would cause injury, either in the form of lost income or in the form of lost patients.

Count III, however, presents a different situation from the first two counts. While the 1999 settlement agreement precludes reimbursement for several of the various services chiropractors can perform, plaintiffs asserted that TRUST providers are not covered by that agreement (and thus are not limited by it) and therefore should get reimbursement for any service they are licensed to provide. Plaintiffs argue that, for example,

spinal decompression is within the scope of chiropractic, but defendant refuses to reimburse chiropractors for this service while at the same time reimbursing other practitioners for that service. However, regardless of the scope of the 1999 settlement agreement, both kinds of provider agreements limit reimbursement to "covered services," and both contracts define "covered services" as meeting three requirements: "(i) identified as payable in Certificate(s), (ii) medically necessary as defined in such Certificates, and (iii) ordered and performed by a PRACTITIONER licensed to order and perform such services." The third element is the only one of the three that might be established by common proofs. Whether the other two are met (and thus, whether the services for which reimbursement is being sought were, in fact, "covered services") depends on whether the treatment is "medically necessary" and "identified as payable." The answer to both of these questions can only be ascertained by examining the certificate[3] held by the individual member who sought treatment. Reference to the statutory definition of chiropractic, MCL 333.16401(1)(e), or any other identification of what is within the scope of chiropractic cannot serve to expand the limits of a certificate.

The present record indicates that there could be hundreds of different certificates, and there is no evidence whether the terms of these are identical, somewhat similar, or completely different. Unlike with

[3] "Certificate" is defined by the provider agreements as

> benefit plan descriptions under the sponsorship of BCBSM, or certificates and riders issued by BCBSM, or under its sponsorship, or Member's coverage documents or benefits provided pursuant to contracts issued by other Blue Cross or Blue Shield (BCBS) Plans, administered through reciprocity of benefit agreements or other Inter-Plan Arrangements such as BlueCard.

counts I and II, there is no overarching legal question to be addressed; whether reimbursement was wrongfully denied hinges on whether "covered services" were provided. Thus, for count III, the proposed class definition is not supported by the record at this point because there is no evidence that count III does not require an examination of each certificate involved in every challenged reimbursement denial. Further discovery could reveal how similar the certificates are and whether the required elements of a certifiable class can be adequately supported. Without more, however, certifying the class with regard to this count was erroneous because of the apparent need for individual proofs, that is, as discussed in part VII of this opinion, for this count, the commonality requirement is not met.

Similarly, to the extent plaintiffs seek compensatory and exemplary damages, the class definition expressly limiting the class to plaintiffs who have suffered compensable damages is problematic. As defendant points out, establishing that a patient left someone's practice because of BCBSM's delay requires an individual examination of facts. Likewise, whether a practitioner is entitled to compensatory damages requires an examination of claims submitted and denied, or services provided and not reimbursed by defendant. Like count III, this would require an examination of each patient's certificate to see if the denied claim was a "covered service" in the first place.

Accordingly, we decline to decertify the class on the basis of the definition of the class. For counts I and II, unlike the problems with the definition used in *Tinman*, the problems with the definition used in this case arise more from the remedies sought by each count and by difficulties in satisfying the requirements of MCR 3.501(A)(1), than from the definition itself. Count III,

however, requires individual fact-finding for each potential class member, and we conclude that the record does not support the proposed class definition with regard to this count. We hold that plaintiffs' claims for declaratory relief should be bifurcated from those seeking retrospective compensatory damages and that the class definition is valid for the declaratory relief plaintiffs seek for count II, and for count I if plaintiffs are able to amend their complaint on remand to seek declaratory relief in that count. MCR 3.501(B)(3)(d)(i).

## VI. NUMEROSITY

Defendant next argues that the numerosity requirement of MCR 3.501(A)(1)(a) has not been met because there are no proofs in the record regarding how many chiropractic physicians might be in the class.[4] We agree that the trial court erred by holding that plaintiffs satisfied the numerosity requirement after it considered only the evidence of the number of chiropractors holding contracts with defendant. Moreover, plaintiffs provide in their brief no estimate of the size of the class.

In *Zine v Chrysler Corp*, 236 Mich App 261, 287-288; 600 NW2d 384 (1999), we stated:

> There is no particular minimum number of members necessary to meet the numerosity requirement, and the exact number of members need not be known as long as general knowledge and common sense indicate that the class is large. Because the court cannot determine if joinder of the class members would be impracticable unless it knows the approximate number of members, *the plaintiff*

[4] Although numerosity was not an issue raised in the statement of questions in defendant's application, we have authority to consider such issues, and we choose to do so because it is fully briefed and is an integral part of the class-certification requirements. See MCR 7.216(A); *United Parcel Serv, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 204; 745 NW2d 125 (2007).

> *must adequately define the class so potential members can be identified and must present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members*. [Citations omitted; emphasis added.]

In *Zine*, the plaintiffs sought to certify a proposed class of over 522,600 persons who had purchased defendant's vehicles and had been misled by information distributed to the purchasers concerning their rights under Michigan law. *Id*. at 267. The trial court denied the motion to certify the class, and this Court affirmed. The Court noted that none of the plaintiffs had identified a specific number of class members and that the plaintiffs had only "indicated that the class potentially included all 522,658 purchasers of new Chrysler products from February 1, 1990, onward." *Id*. at 288.

> However, class members must have suffered actual injury to have standing to sue, so plaintiffs must show that there is a sizable number of new car buyers who had seriously defective vehicles and lost their right to recovery under Michigan's lemon law because they were misled by the documents supplied by Chrysler. Neither [of the plaintiffs] indicated even approximately how many people might come within this group, nor did they indicate a basis for reasonably estimating the size of the group. Therefore, both [plaintiffs] failed to show that the proposed class is so numerous that joinder of all members is impracticable. [*Id*. at 288-289 (citation omitted).]

The present case is factually analogous. Each class member must meet the class definition's three features: be a MAC member, be a signatory to a BCBSM provider agreement, and have been wrongfully denied reimbursement. There is no allegation that defendant has wrongfully denied claims of *all* MAC chiropractors and, like the plaintiffs in *Zine*, plaintiffs do not "indicate[] even approximately how many people might come

within this group . . . ." *Id*. at 289. Plaintiffs' motion brief proposed that the number of chiropractic physicians listed in defendant's provider directory (2,589) was "likely the minimum number of class members," that is, there might be even more because that number did not include persons who had been, but were no longer, providers. The trial court looked only at that number and accepted it without considering the other two requirements. This was clear error. Plaintiffs' class definition sets three requirements: the first two alone limit the number to at most 1,400 to 1,500—the class cannot be any larger than the number of MAC members that have or had provider contracts—and there is no evidence of the number that meet the third limitation, i.e., those who have been wrongfully denied reimbursement.

However, after reviewing the record, we conclude that reversal on the basis of this issue is not required. By limiting plaintiffs' remedies to declaratory relief, we deemphasize the need to estimate the number of chiropractors suffering actual financial harm. Finally, on remand, the trial court must require plaintiffs to provide an actual estimate of the number of chiropractors that meet the third element of the class definition before plaintiffs may proceed with the damages portion of their suit.

## VII. COMMONALITY

Defendant next argues that there is no generalized proof that can establish injury on a class-wide basis. For example, even if the representative plaintiff can show that he timely submitted a "clean claim" for a covered service and that he was denied relief through the contractual dispute-resolution process, that would not show that BCBSM had a policy of doing so or that any other class member was injured in the same way. Again,

we conclude that bifurcating the declaratory remedies sought from the damages remedies sought resolves the conflict inherent in the proposed definition.

Under MCR 3.501(A)(1)(b), a prerequisite for a certifiable class action suit is that "there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members[.]" As we have already discussed, the counts involving misrepresentation during negotiations (count I) and unilateral changes in reimbursable codes (count II) involve common questions. This Court in *Tinman* explored the issue of common questions:

> The common question factor is concerned with whether there is a common issue the resolution of which will advance the litigation. . . . It requires that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof.
>
> . . . It is not every common question that will suffice, however; at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality. A plaintiff seeking class-action certification must be able to demonstrate that all members of the class had a common injury that could be demonstrated with generalized proof, rather than evidence unique to each class member . . . . [T]he question is . . . whether the common issues [that] determine liability predominate. [*Tinman*, 264 Mich App at 563-564 (citations and quotation marks omitted; alterations by *Tinman*).]

Like the trial court in this case, the trial court in *Tinman* did not separately address the propriety of certifying each count of the plaintiff's complaint, but determined that, as a whole, the plaintiff's suit merited class-action certification. This Court disagreed, concluding that the issues involved a "highly individualized inquiry . . . to determine whether de-

fendant engaged in a reasonable investigation based on the available information before denying a particular claim." *Id*. at 564.

Defendant argues that this case is analogous because whether a provider was wrongfully denied reimbursement depends on individualized inquiries into whether the treatment was medically necessary, whether a timely "clean claim" was submitted, and whether the provider was qualified to render the service. But if the issue is whether defendant has an across-the-board policy of refusing to reimburse chiropractors for covered services for which reimbursement is permitted by the agreements, then individual assessment for each claimant is not necessary at the class-certification stage, and the common issues predominate. Viewed in the broadest way, and taking the allegations of count II at face value, if defendant systematically breaches its provider agreements with chiropractors by refusing to reimburse as required by contract, then any chiropractor with a BCBSM provider agreement potentially has a claim. Individual questions only arise after a breach or misrepresentation has been established, at which point class members would need to prove their damages. Count I is similar where common answers exist regarding defendant's intent and plaintiffs' reliance. For both of these counts, as with the numerosity requirement, limiting the suit at this point to declaratory relief only forestalls the need for the individualized proofs that are required in determining monetary damages.

Count III, however, is simply an aggregate of individual breach of contract claims. The claims of class members

> must depend upon a common contention . . . . That common contention, moreover, must be of such a nature that it

> is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.
>
> "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." [*Wal-Mart Stores, Inc v Dukes*, 564 US ___, ___; 131 S Ct 2541, 2551; 180 L Ed 2d 374, 389-390 (2011), quoting Nagareda, *Class certification in the age of aggregate proof*, 84 NY U L R 97, 132 (2009).]

For this count, the answers sought relate to whether defendant breached its contracts by wrongfully denying reimbursement. But in each individual case, defendant's denial of reimbursement could be due to any number of factors, not the least of which is that coverage of chiropractic services may be limited by a patient's certificate, or may not be defined by the certificate as "medically necessary" at the frequency that plaintiffs would prefer. Defendant's stated reasons for denying reimbursement are not identified by plaintiffs, so it is unknown how many claims were refused because they were not timely, because the patient was not a subscriber, because the service was not covered at all, or because the frequency of the service exceeded what was covered. It would not be enough to show that claims for certain codes are routinely denied without some proof that no valid reason for denial exists. Therefore, count III, like the claim in *Tinman*, requires an individual inquiry for each purported class member. The trial court did not appear to consider the counts individually, and count III's differences from the other counts, and similarity to the claim in *Tinman*, make it unsuitable for class certification.

VIII. TYPICALITY

Defendant argues that the typicality requirement is not met for the same reasons as the commonality requirement. Commonality and typicality "tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen Tel Co of the Southwest v Falcon*, 457 US 147, 157 n 13; 102 S Ct 2364; 72 L Ed 2d 740 (1982). However, they are separate elements. Typicality is established when "the claims or defenses of the representative parties are typical of the claims or defenses of the class[.]" MCR 3.501(A)(1)(c). When the allegations merely make a bare statement that the requirement is met, the trial court must independently determine that the plaintiffs can sufficiently support "their allegations that their legal remedial theories were typical of those of the class." *Henry*, 484 Mich at 506 n 40.

When taken at face value, Dr. Mitchell's allegations that he suffered damages because defendant misrepresented its intent in negotiating a further expansion of covered services, that defendant systematically breached the 1999 settlement agreement by unilaterally changing or eliminating reimbursable services, and that defendant refused to reimburse him for covered services are in large part typical of the class. Here too, however, the same problem with count III arises: defendant may be consistently refusing reimbursement for improper reasons, but proof of that requires an examination of individual claims to ascertain the reasons for denial before it can be found that those reasons were merely a smokescreen to hide a pattern of discrimina-

tory conduct. If Dr. Mitchell regularly fails to timely submit his claims, for example, then his may not be typical of the claims being submitted by the class. Without knowing why Dr. Mitchell's claims are denied, it is impossible to know whether his claims might be typical of the class. To the extent the trial court's order failed to recognize the individual inquiry needed for resolution of count III, it erred by certifying the class for the entire complaint.

## IX. ADEQUACY

Defendant argues that Dr. Mitchell cannot adequately represent the class because there was no evidence that he ever submitted a timely claim for a medically necessary, covered service that BCBSM then failed to reimburse.[5] As are the other requirements, the adequacy element is sufficiently met for counts I and II, but not for count III. Even if the class definition is legally sound, Dr. Mitchell is not an adequate representative for count III because he failed to establish that he exhausted his contractual remedies.

Generally, "[O]ne may not pursue a cause of action in a class that one could not pursue individually." *Cork v Applebee's of Mich, Inc*, 239 Mich App 311, 319; 608 NW2d 62 (2000). The provider agreements specify a three-step process for resolving reimbursement disputes. The provider must first send defendant a written complaint, and if defendant's explanation is unsatisfactory, then the parties meet in an informal conference. If

[5] Adequacy was not an issue raised in the statement of questions in defendant's application. However, we have authority to consider such issues, and we choose to do so because it is fully briefed and is an integral part of the class certification requirements. See MCR 7.216(A); *United Parcel Serv, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 204; 745 NW2d 125 (2007).

defendant's postconference proposed resolution is unsatisfactory, then the provider has a choice of seeking binding arbitration, review by the Department of Insurance and Financial Services, or judicial review. Here, there is no evidence that any class member has properly pursued, and received an unsatisfactory resolution to, a dispute.

In his affidavit, Mitchell stated:

> Despite [the provider agreements], and the 1999 Agreement, Blue Cross continually refuses to reimburse me for services that those agreements require it to reimburse for. In these instances, I am forced to bill my patients directly at a reduced rate. However, because Blue Cross will reimburse other providers, such as osteopaths, for these same services that I provide, I often lose patients because they do not wish to pay for their treatment out of pocket and will simply see a provider that will be covered by their insurance.

Whether the agreements require reimbursement is a legal question, not a fact. Mitchell does not provide facts supporting his conclusion that reimbursement was wrongfully denied, such as a claim denied as being untimely when it was not. Mitchell also identified CPT codes for which BCBSM limits or disallows reimbursement, but did not aver ever having been wrongfully denied reimbursement for those codes, nor did he point to any requirement in his provider agreement that those services be reimbursed or establish that "other providers" are reimbursed if they use those same codes. Finally, he identified services that he was capable of providing, "such as heat therapy and massage," but there is no evidence that those are covered services for which any health care provider is reimbursed. Thus, even if other potential class members have had claims wrongfully denied, Mitchell's affidavit does not provide factual support that he has had claims wrongfully denied.

X. CONCLUSION

Plaintiffs did not establish that their claims for compensatory relief satisfy the class requirements set out in MCR 3.501(A)(1). The trial court should have bifurcated the declaratory claims for count II and certified the class for that count. We note that plaintiffs have not at this point sought declaratory relief under count I. If plaintiffs fail to seek to amend their complaint, count I should be decertified in its entirety. If plaintiffs are able to amend their complaint on remand to seek declaratory relief in count I, the trial court should bifurcate the declaratory relief claims and also certify the class for that count. MCR 3.501(B)(3)(d)(i) states that a court may order that "the action be maintained as a class action limited to particular issues or forms of relief . . . ." While this is a discretionary rule, because of the unsuitability of the compensatory relief sought and the failure of plaintiffs to establish commonality, typicality, and adequacy for count III, the trial court abused its discretion by allowing certification of the class for plaintiffs' entire complaint.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

METER and M. J. KELLY, JJ., concurred with FITZGERALD, P.J.

MICHIGAN ASSOCIATION OF CHIROPRACTORS v BLUE CARE NETWORK OF MICHIGAN, INC

Docket No. 304783. Submitted February 12, 2013, at Lansing. Decided April 18, 2013, at 9:15 a.m.

The Michigan Association of Chiropractors (MAC), a voluntary trade association representing the interests of approximately 1,600 chiropractic doctors in Michigan, and Nicholas S. Griffiths, D.C., a licensed chiropractic doctor with offices in Wayne County, brought an action in the Ingham Circuit Court against Blue Care Network of Michigan, Inc. (BCN), a health maintenance organization licensed under chapter 35 of the Insurance Code, MCL 500.3501 *et seq*. Plaintiffs alleged that BCN openly and illegally discriminates against its network's chiropractic physicians by failing to reimburse them for services for which it reimburses its other network physicians and that BCN's discriminatory practices effectively limit the number of chiropractic physicians that can be network providers. The complaint alleged three counts. Count I alleged that the policies and practices of BCN and its member physicians unlawfully limit the access chiropractic physicians have to the provider network and its members by maintaining an insufficient network of chiropractic care providers and by actively directing its members to seek chiropractic services from physicians through its website and referrals by its member physicians. Count II alleged two ways BCN discriminates in reimbursing network chiropractic physicians: (1) by reimbursing nonchiropractors providing certain services yet refusing to reimburse chiropractic physicians providing those same services (or imposing frequency limits on those services), and (2) by refusing to reimburse chiropractic physicians for providing other services within the scope of chiropractic medicine, such as physical-therapy services. Count III alleged that BCN's illegally discriminatory policies and practices constituted a breach of contract because the affiliation agreement its network chiropractors must each sign includes a clause requiring BCN to "perform the legal and regulatory functions required" under state and federal law. Plaintiffs sought a declaratory judgment with regard to all three counts and "damages caused by such breaches of contract" with regard to count III. Plaintiffs moved to have the action certified as a class action, proposing five separate classes for

certification. Class 1 consisted of "those chiropractors who have ever applied for membership in BCN and were denied membership." Class 2 consisted of "those chiropractors who at one time were members of BCN but who were disaffiliated from BCN against their will." Class 3 consisted of "those chiropractors who have not sought membership with BCN because doing so would be futile given BCN's open practice of not allowing chiropractors to become members of BCN." Class 4 consisted of "those chiropractors who are, or have been members of BCN, and who have suffered harm due to BCN's policy of requiring its insureds to obtain a referral before seeing a chiropractor and BCN's open policy of discouraging referrals to chiropractors." Class 5 consisted of those "chiropractors who have been economically harmed as a result of BCN's policies" that "include, but are not limited to, refusing to reimburse chiropractors for services within their scope of work, reimbursing other providers for these same services, burdensome deductibles and imposing burdensome copays on insureds who utilize chiropractors driving patients away from chiropractic care." Plaintiff's brief submitted with the motion included a table identifying their estimates of the size of each class, based on a survey of MAC members and extrapolated "by multiplying the percentage of those who responded in each proposed class by the total number of chiropractors in the state." The estimates ranged from several hundred members to over 1,500 members. Plaintiffs asserted that common questions of law and fact predominated in the matter, including whether BCN unlawfully discriminated against chiropractors by denying access to the network, by requiring referrals to chiropractors and promoting a policy of refusing referrals to chiropractors, and by refusing to reimburse chiropractors for the same services for which it reimbursed other providers. Plaintiffs also offered the affidavit of Dr. Griffiths as a representative plaintiff. BCN argued against class certification, asserting, in part, that individual facts predominated over the common questions in the matter. The court, Paula J. M. Manderfield, J., disagreed with BCN and concluded that the initial question to be answered—whether BCN had engaged in particular policies—did not require an examination of individuals' circumstances. The court also determined that Dr. Griffiths satisfied the typicality requirements for representing all the classes. The Court of Appeals granted BCN's delayed application for leave to appeal. *Mich Ass'n of Chiropractors v Blue Care Network of Mich*, unpublished order of the Court of Appeals, entered February 22, 2012 (Docket No. 304783).

The Court of Appeals *held*:

1. Certification of a class is controlled by MCR 3.501(A)(1), which contains prerequisites relating to numerosity, commonality,

typicality, adequacy, and superiority. The action must meet all the prerequisites of the court rule in order to proceed as a class action. The court may not simply accept as true a party's bare statement that a prerequisite is met without making an independent determination that basic facts and law are stated adequately to support the prerequisite. If the pleadings are not sufficient, the court must consider additional information beyond the pleadings to determine whether class certification is proper.

2. Plaintiff's seeking class certification must provide objective criteria by which class membership is to be determined. Application of this rule requires the Court of Appeals to decertify Class 3 because membership cannot be established without knowing the subjective reason why each chiropractor gave up on the quest to affiliate with BCN.

3. The requirement of Class 2 that members are those who have been disaffiliated against their will is not problematic as long as plaintiffs can document whether an affiliation was terminated by the chiropractor or by BCN. If, on remand, plaintiffs cannot provide such evidence, the trial court must decertify Class 2.

4. The definition of Class 5 is overly broad. As written, any BCN policy that causes financial harm could be at issue, for example, a refusal to reimburse untimely claims. Because it appears that plaintiffs did not intend such a broad definition, the definition may be narrowed by adding language so that the class consists of "chiropractors who have been economically harmed as a result of BCN's policies that unlawfully discriminate against chiropractors. These polices include, but are not limited to, refusing to reimburse chiropractors for services within the scope of their work, reimbursing other providers for these same services, burdensome deductibles and imposing burdensome copays on insureds who utilize chiropractors driving patients away from chiropractic care."

5. Each of the counts presents an opportunity to provide class-wide, declaratory answers to the legal questions plaintiffs raise. The commonality and typicality requirements of MCR 3.501(A)(1) are met for the declaratory judgment aspects of the case.

6. Aspects of the retrospective compensatory relief plaintiffs seek require an examination of individual circumstances for each purported class member. Plaintiffs did not establish that their claims for retrospective compensatory relief satisfy the class certification requirements of MCR 3.501(A)(1). The trial court should have bifurcated the declaratory claims and certified properly defined classes for the declaratory claims only. Because of the

unsuitability of the retrospective compensatory claims for class certification, the trial court abused its discretion by allowing certification of the classes for plaintiffs' entire complaint.

7. Dr. Griffiths was never denied membership in BCN and thus is not a member of Class 1 as proposed by plaintiffs. He is not qualified to represent Class 1. The trial court should not have certified Class 1 as defined in the complaint with Dr. Griffiths as its representative. However, plaintiffs intended Class 1 to have a broader scope than is allowed by the specific wording they proposed. The trial court should have set forth a more suitable definition of the class pursuant to MCR 3.501(B)(3)(c). Therefore, under the authority granted by MCR 7.216(A)(1), the Court of Appeals modified the definition of Class 1 so that it encompasses "those chiropractors who have ever applied for membership in BCN and were denied membership or whom BCN denied the opportunity to apply."

8. The trial court's order granting certification for the following classes (as modified in the opinion of the Court of Appeals) must be affirmed:

Class 1: The first class consists of those chiropractors who have ever applied for membership in BCN and were denied membership or whom BCN denied the opportunity to apply.

Class 2: The second class consists of those chiropractors who at one time were members of BCN but who can show by objective proof that they were disaffiliated from BCN against their will.

Class 3: The third class consists of those chiropractors who are, or have been, members of BCN and who have suffered harm because of BCN's policy of requiring its insureds to obtain a referral before seeing a chiropractor and BCN's open policy of discouraging referrals to chiropractors.

Class 4: The fourth class consists of those chiropractors who have been economically harmed as a result of BCN's policies that unlawfully discriminate against chiropractors. These policies include, but are not limited to, refusing to reimburse chiropractors for services within their scope of work, reimbursing other providers for these same services, burdensome deductibles, and imposing burdensome copays on insureds who utilize chiropractors driving patients away from chiropractic care.

Affirmed in part, reversed in part, and remanded.

ACTIONS — CLASS ACTIONS — CLASS CERTIFICATION — OBJECTIVE CRITERIA.

Plaintiffs seeking class certification must provide objective criteria by which class membership is to be determined.

*Miller, Canfield, Paddock and Stone, P.L.C.* (by *Richard A. Gaffin* and *Kenneth T. Brooks*), for plaintiffs.

*Dickinson Wright PLLC* (by *Joseph A. Fink*, *Jeffery V. Stuckey*, and *Scott R. Knapp*) and *Nicole M. Wotlinski* for defendant.

Before: FITZGERALD, P.J., and METER and M. J. KELLY, JJ.

FITZGERALD, P.J. Defendant, Blue Care Network of Michigan, Inc. (BCN), appeals by leave granted the order granting the motion of plaintiffs, Michigan Association of Chiropractors (MAC), also known as the Chiropractic Association of Michigan, and Nicholas S. Griffiths, D.C., for certification of five classes of plaintiffs. This case was submitted and argued with *Mich Ass'n of Chiropractors v Blue Cross Blue Shield of Mich*, 300 Mich App 551; ___ NW2d ___ (2013). Defendant here asserts that four of plaintiffs' five proposed classes were improperly certified because the class definition is fundamentally flawed and that all classes were improperly certified because plaintiffs have not satisfied the commonality and typicality requirements of MCR 3.501(A)(1). For the reasons given hereinafter, we affirm in part, reverse in part, and remand for further proceedings.

## I. BACKGROUND

The complaint in this case alleges that MAC is a voluntary trade association representing the interests of approximately 1,600 chiropractic doctors in Michigan. Dr. Griffiths is a licensed chiropractic doctor with offices in Wayne County. BCN is a Michigan health maintenance organization (HMO) licensed under chapter 35 of the Michigan Insurance Code, MCL 500.3501

*et seq*. It has nearly a half-million enrollees. Over 400 MAC members are members of BCN's provider network. However, before January 1, 2006, BCN had virtually no chiropractic physicians in its network. After January 1, 2006, it began providing reimbursement for chiropractic services only when they were provided by network chiropractic physicians, but at that time it had only 17 network chiropractic physicians. The essence of the complaint is that BCN openly and illegally discriminates against its network's chiropractic physicians by failing to reimburse them for services for which it reimburses its other network physicians and that its discriminatory practices effectively limit the number of chiropractic physicians that can be network providers.

## II. THE COMPLAINT AND PROPOSED CLASSES

In their complaint, plaintiffs allege that BCN violated the Michigan Insurance Code in a number of ways. Plaintiffs claim that BCN has a practice of not paying chiropractic providers for covered chiropractic services while it pays other nonchiropractic providers for providing the same services and that its discriminatory practices illegally limit patient access to chiropractic services. The complaint states three counts. Count I alleges that the policies and practices of BCN and its member physicians unlawfully limit the access chiropractic physicians have to the provider network and its members by maintaining an insufficient network of chiropractic care providers and by actively directing its members to seek chiropractic services from nonchiropractic physicians through its website and through referrals by its member physicians. Count II alleges two ways BCN discriminates in reimbursing network chiropractic physicians: (1) by reimbursing nonchiropractors

providing certain services yet refusing to reimburse chiropractic physicians providing those same services (or imposing frequency limits on those services), and (2) by refusing to reimburse chiropractic physicians for providing other services within the scope of chiropractic medicine, such as physical-therapy services. Count III alleges that BCN's illegally discriminatory policies and practices constitute a breach of contract because the affiliation agreement its network chiropractors must each sign includes a clause requiring BCN to "perform the legal and regulatory functions required" under state and federal law. Plaintiffs sought a declaratory judgment on all counts and, for count III, "damages caused by such breaches of contract."

Plaintiffs moved for class certification, proposing five separate classes for certification:

> Class 1: The first class consists of those chiropractors who have ever applied for membership in BCN and were denied membership.
>
> Class 2: The second class consists of those chiropractors who at one time were members of BCN but who were disaffiliated from BCN against their will.
>
> Class 3: The third class consists of those chiropractors who have not sought membership with BCN because doing so would be futile given BCN's open practice of not allowing chiropractors to become members of BCN.
>
> Class 4: The fourth class consists of those chiropractors who are, or have been members of BCN, and who have suffered harm due to BCN's policy of requiring its insureds to obtain a referral before seeing a chiropractor and BCN's open policy of discouraging referrals to chiropractors.
>
> Class 5: The final class consists of chiropractors who have been economically harmed as a result of BCN's policies. These policies include, but are not limited to, refusing to reimburse chiropractors for services within their scope of work, reimbursing other providers for these

> same services, burdensome deductibles and imposing burdensome copays on insureds who utilize chiropractors driving patients away from chiropractic care.

Plaintiffs' motion brief includes a table identifying their estimates of the size of each class, based on a survey of MAC members and extrapolated "by multiplying the percentage of those who responded in each proposed class by the total number of chiropractors in the state." The estimates range from several hundred members to over 1,500 members.

Plaintiffs asserted that common questions of law and fact predominate in the matter, and they identified those questions as:

> 1) whether BCN unlawfully discriminated against chiropractors by denying access to the network, 2) whether BCN unlawfully discriminated against chiropractors by requiring referrals to chiropractors and promoting a policy of refusing referrals to chiropractors, and 3) whether BCN discriminated against chiropractors by refusing to reimburse chiropractors for the same services it reimbursed other providers for.

In support of the motion, plaintiffs offered the affidavit of Dr. Nicholas S. Griffiths as a representative plaintiff. He averred that he had been a BCN member starting in 2004, but he was "disaffiliated" in early 2006. He stated, "Many of my patients left my practice." He asserted that BCN at first refused to send him an application, but he persisted despite the apparent futility, and eventually he was sent an application and was accepted back into the network in January 2007. Dr. Griffiths further alleged that he was dependent on getting referrals from primary care physicians and sometimes they refused to refer patients for chiropractic care. In addition, he also asserted that he had problems getting reimbursed by BCN "for services it is required to cover."

Defendant argued against class certification, asserting that individual facts predominated over common questions. It stated that the limitation on access to its network was not discrimination per se and therefore each denial or disaffiliation required an examination of the individual circumstances. It further asserted that the class definitions were too broad, conflicted, and unworkable. And, defendant argued, if BCN's plans have been approved by the Office of Financial and Insurance Regulation (now the Department of Insurance and Financial Services), as required by statute, any complaints about coverage should come from that department or from BCN's insured members, not from chiropractors who have no contract with BCN.

The trial court disagreed. In a written opinion, the court concluded that the initial question to be answered in the suit—whether defendant had engaged in particular policies—did not require the examination of individuals' circumstances. The court also determined that Dr. Griffiths satisfied the typicality requirement. Defendant filed a delayed application for leave to appeal, which we granted, limited to the issues raised in the application.[1]

## III. STANDARD OF REVIEW

Interpretation of MCR 3.501(A) presents a question of law that we review de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). The analysis a court must undertake regarding class certification may involve making both factual findings and discretionary decisions. *Id*. at 495-496. We review the trial court's factual findings for clear error and the decisions

[1] *Michigan Ass'n of Chiropractors v Blue Care Network of Mich*, unpublished order of the Court of Appeals, entered February 22, 2012 (Docket No. 304783).

that are within the trial court's discretion for an abuse of discretion. *Id*. The burden of establishing that the requirements for a certifiable class are satisfied is on the party seeking to maintain the certification. *Tinman v Blue Cross & Blue Shield of Mich*, 264 Mich App 546, 562; 692 NW2d 58 (2004); see also *Henry*, 484 Mich at 509.

### IV. MCR 3.501(A)(1)

Certification of a class is controlled by court rule. Under MCR 3.501(A)(1), one or more members of a purported class may file suit on behalf of all members only if:

> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are question of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

These prerequisites are often referred to as numerosity, commonality, typicality, adequacy, and superiority. *Henry*, 484 Mich at 488. "[T]he action must meet *all* the requirements in MCR 3.501(A)(1); a case cannot proceed as a class action when it satisfies only some, or even most, of these factors." *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 597; 654 NW2d 572 (2002).

Although the federal " 'rigorous analysis' " approach does not apply under our state law, "a certifying court may not simply 'rubber stamp' a party's allegations that the class certification prerequisites are met." *Henry*, 484 Mich at 502. The court's decision to certify may be based on the pleadings alone only if the averments therein satisfy the party's burden of proving that the requirements of MCR 3.501 are met, "such as in cases where the facts necessary to support this finding are uncontested or admitted by the opposing party." *Henry*, 484 Mich at 502-503. The court "may not simply accept as true a party's bare statement that a prerequisite is met" without making an independent determination that basic facts and law are stated adequately to support that prerequisite. *Id*. at 505. "If the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper." *Id*. at 503. The court should analyze asserted facts, claims, defenses, and relevant law, but "should avoid making determinations on the merits of the underlying claims at the class certification stage of the proceedings." *Id*. at 488; see also *id*. at 504.

Precedential caselaw on the subject of certification is thin in Michigan. *Henry*, the lead case in Michigan on class certification, involved allegations that the defendant, Dow Chemical Company, had negligently released dioxin into the Tittabawassee River. The plaintiffs sought certification of a class of "persons owning real property within the 100-year flood plain of the Tittabawassee River on February 1, 2002," estimated by the plaintiffs to consist of approximately 2,000 persons. *Id*. at 491. The trial court held a two-day hearing in which it reviewed numerous scientific studies, affidavits from experts, and state-agency-provided information from both parties. The Michigan Supreme Court concluded

that, although the trial court's analyses of the prerequisites identified in MCR 3.501(A)(1)(a), (b), and (e) were sufficient, the record was insufficient to determine if the trial court had made a valid, independent determination regarding the typicality and adequacy prerequisites of MCR 3.501(A)(1)(c) and (d). *Henry*, 484 Mich at 506. Accordingly, the case was remanded for clarification of the trial court's analysis of those two prerequisites. *Id*. at 509. Thus, although *Henry* sets out the details of the proper test under the court rule, it provides little guidance in applying the prerequisites.

### V. CLASS DEFINITION

Defendant first argues that all classes except Class 1 impermissibly require a subjective assessment or a determination of the merits in order to ascertain class membership. Further, defendant argues, because Class 2 includes chiropractors disaffiliated "against their will" and Class 3 includes those who thought applying for membership was "futile," the only way to determine who is a class member is to probe each individual's subjective thoughts. Defendant additionally asserts that the definitions of Classes 4 and 5 are defective because they require an examination of the merits (i.e., whether BCN has discriminatory policies) in order to determine who is in the class.

Defendant relies on *Tinman*, 264 Mich App 546, arguing that the classes sought here are analogous to the class this Court decertified in that case. The *Tinman* class was defined as:

> "[A]ll persons who, during the period from June 9, 1998, through the present, were, are and will be entitled to receive health care benefits from Blue Cross & Blue Shield of Michigan (BCBSM) for emergency health care services, but were, or will be, denied health care benefits for

> emergency health care services by BCBSM based on the final diagnosis of their medical condition (excluding any officers or directors of BCBSM, and their family members)." [*Id*. at 552-553.]

The trial court in *Tinman* had found that the predominant issue was whether BCBSM's " 'systematic practice' " of denial on the basis of the final diagnosis of a medical condition violated statutory law and the certificates it issued and that this was a common question of fact and law meeting the requirements of MCR 3.501(A)(1)(b). *Tinman*, 264 Mich App at 563. This Court disagreed, concluding:

> Rather than being subject to generalized proofs, the evidence of the type of emergency health services and medically necessary services provided, the medical conditions involved and whether they occurred suddenly, the signs and symptoms that manifested those medical conditions, and whether payment was denied for services up to the point of stabilization will all vary from claimant to claimant. Thus, it is evident that to determine defendant's liability, highly individualized inquiries regarding the circumstances relevant to each claim clearly predominate over the more broadly stated common question in this case. [*Id*. at 564-565.]

Defendant asserts that what plaintiffs seek here is no different from what was sought in *Tinman* because establishing each loss attributable to BCN's affiliation and referral policies depends on individual assessments. However, it can also be argued that the landscape in this case is slightly different from *Tinman* because of the allegations that defendant has organization-wide policies that violate various statutes in the Insurance Code. Rather than viewing defendant's conduct as resulting from a series of individual decisions, defendant's conduct can be seen largely as showing that it adhered to a single policy of discrimination that affected many pro-

vider and nonprovider chiropractors in the same way. Like the declaratory issues in *Mich Ass'n of Chiropractors*, this broad, legal question is more suited to class resolution than the issue in *Tinman* because of the desirability of consistent results for all potential plaintiffs.

However, unlike the class definition in *Mich Ass'n of Chiropractors*, some of the class definitions in this case require an examination of subjective factors, such as whether a practitioner believed it futile to seek membership in BCN. Under federal law, class membership must be determined by objective criteria. See *Garrish v UAW*, 149 F Supp 2d 326, 330-331 (ED Mich, 2001), citing 5 Moore's Federal Practice, § 23.21[1] (3d ed, 1998).[2] We agree that this rule is sound, because otherwise individuals would simply be able to decide for themselves whether they wish to be included in the class, and we hold that plaintiffs seeking class certification must provide objective criteria by which class membership is to be determined.

Applying this rule to plaintiffs' proposed classes requires us to decertify Class 3 because membership cannot be established without knowing the subjective reason why each chiropractor gave up on the quest to affiliate with BCN. Class 2's requirement that members are those who have been disaffiliated "against their will" is not problematic as long as plaintiffs can document whether an affiliation was terminated by the chiropractor or by BCN. If they cannot provide such evidence on remand, the trial court should decertify Class 2 as well. As for the other classes, any

[2] See also 5 Moore's Federal Practice, § 23.21[3][a] (3d ed, 2013), p 23-46 ("For a class to be sufficiently defined, the court must be able to resolve the question of whether class members are included or excluded from the class by reference to objective criteria.").

problems in certification arise from establishing the requirements of the court rule, not from the definitions themselves.

However, we also find that the definition of Class 5 is overly broad. As written, any BCN policy that causes financial harm could be at issue, for example, a refusal to reimburse untimely claims. In the context of plaintiffs' complaint, it appears that such a broad definition was not intended. We therefore narrow that definition by adding the following italicized text so that the class consists of "chiropractors who have been economically harmed as a result of BCN's policies *that unlawfully discriminate against chiropractors*. These policies include, but are not limited to, refusing to reimburse chiropractors for services within their scope of work, reimbursing other providers for these same services, burdensome deductibles and imposing burdensome copays on insureds who utilize chiropractors driving patients away from chiropractic care."

In sum, we hereby adopt the federal "objective criteria" requirement stated in *Garrish*, 149 F Supp 2d at 330-331. In accord with this, we reverse the trial court's decision, in part, modify the definition of Class 5 as stated above, order plaintiffs to provide evidentiary support for Class 2 as described above, and decertify Class 3 because it requires reliance on subjective criteria. See *Citizens for Pretrial Justice v Goldfarb*, 415 Mich 255, 272; 327 NW2d 910 (1982) (court may redefine a class so it meets requirements for certification). The other classes need not be decertified on the basis of their definitions alone.

## VI. COMMONALITY AND TYPICALITY

Defendant next argues that plaintiffs failed to satisfy the elements of commonality and typicality. Defendant

asserts that each of the classes requires an improper, individualized determination of membership and that for each class, no proofs supporting Dr. Griffiths's claims (or the claims of another potential representative individual) would help establish that any other class member had suffered the same injury.

Under MCR 3.501(A)(1)(b), a prerequisite for a certifiable class action suit is that "there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members[.]" This Court in *Tinman* explored the issue of common questions:

> The common question factor is concerned with whether there is a common issue the resolution of which will advance the litigation. . . . It requires that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof.
>
> . . . It is not every common question that will suffice, however; at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality. A plaintiff seeking class-action certification must be able to demonstrate that all members of the class had a common injury that could be demonstrated with generalized proof, rather than evidence unique to each class member . . . . [T]he question is . . . whether the common issues [that] determine liability predominate. [*Tinman*, 264 Mich App at 563-564 (citations and quotation marks omitted; alterations by *Tinman*).]

The claims of class members

> must depend upon a common contention . . . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

> "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." [*Wal-Mart Stores, Inc v Dukes*, 564 US ___, ___; 131 S Ct 2541, 2551; 180 L Ed 2d 374, 389-390 (2011), quoting Nagareda, *Class certification in the age of aggregate proof*, 84 NY U L R 97, 132 (2009).]

Each of the counts here presents an opportunity to provide class-wide, declaratory answers to the legal questions plaintiffs raise in their claims. Thus, for the declaratory aspects of the case, the commonality and typicality requirements are met.

The retrospective compensatory relief aspects, however, require an examination of individual circumstances. The reasons for denying or terminating affiliation in each case and for denying reimbursement have no common answer, and like the claim in *Tinman*, require an individual inquiry for each purported class member. Although the parties discussed a two-part approach to the case, the trial court did not appear to consider bifurcation. We conclude that the trial court should have bifurcated the declaratory claims and certified properly defined classes for that relief only. MCR 3.501(B)(3)(d)(i) states that a court may order that "the action be maintained as a class action limited to particular issues or forms of relief[.]" While this is a discretionary rule, because of the unsuitability of the retrospective compensatory claims for class certification, the trial court abused its discretion by allowing certification of the classes for plaintiffs' entire complaint.

As for the typicality requirement, once the issues to be tried as a class action are limited to resolving only the legal questions, most of the asserted problems with Dr. Griffiths's representation disappear. His affidavit

asserts that he was affected by the allegedly discriminatory reimbursement and referral policies and practices here in dispute. And he averred that he was "disaffiliated" from BCN at one point and had to persist in order to be sent another application form. However, he was never denied membership in the network and thus is not a member of Class 1 as proposed by plaintiffs. Accordingly, he is not qualified to represent Class 1, and the trial court should not have certified Class 1 as defined in the complaint with Dr. Griffiths as its representative. *A&M Supply Co*, 252 Mich App at 598.

The trial court relied on the rule derived from federal law, stating: "To meet the typicality requirement, a plaintiff must show that the representative's claim arises from the same event or practice or course of conduct that gives rise to the claims of the other class members, and that it is based on the same legal theory." See *Allen v City of Chicago*, 828 F Supp 543, 553 (ND Ill, 1993). The court then concluded that the "crux of Plaintiffs' claims" was "a series of discriminatory policies" with a particular policy identified with regard to each class. The court determined that the typicality requirement was met for Class 1 because "Dr. Griffiths was repeatedly denied access to Blue Care Network before ultimately being admitted to membership." That, however, is not in accord with the language proposed by plaintiffs for Class 1, which limits the class to chiropractors who "applied for membership in BCN and were denied membership." After examining plaintiffs' exposition of the facts and its related argument, we conclude that the problem lies not with plaintiffs' representative but in its class definition. Plaintiffs' brief emphasizes "BCN's Exclusion of Chiropractors From its Network," and they assert that "it denied requests by chiropractors to join the chiropractic network and claimed that its network was sufficient." While this conduct

clearly includes receiving and then denying applications for membership, it also includes any policy or practice of refusing to make applications available to chiropractors. Notably, if allegations of the latter are true, defendant may be in violation of MCL 500.3531(3), which prohibits it from denying a provider "an opportunity to apply" to become an affiliated provider.[3]

We therefore conclude that plaintiffs intended Class 1 to have a broader scope than is allowed by the specific wording they proposed. The trial court, rather than disregarding the fact that Dr. Griffiths had never had an application for membership denied, should have set forth a more suitable definition of the class, pursuant to MCR 3.501(B)(3)(c). Under the authority granted us by MCR 7.216(A)(1), we modify the definition of Class 1 so that it encompasses "those chiropractors who have ever applied for membership in BCN and were denied membership or whom BCN denied the opportunity to apply."

## VII. CONCLUSION

We conclude that, when examining a proposed class for certification, a court must be able to resolve the question whether class members are included or excluded from the class by reference to objective criteria. In addition, in the present case, plaintiffs did not establish that their claims for retrospective compensatory relief satisfy the class certification requirements set out in MCR 3.501(A)(1). The trial court should have bifurcated the declaratory claims; it abused its discretion by allowing certification of the classes for plaintiffs' entire complaint.

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[3] In full, the subsection states: "A health maintenance organization shall give all health care providers that provide the applicable health maintenance services and are located in the geographic area served by the health maintenance organization an opportunity to apply to the health maintenance organization to become an affiliated provider."

In accord with the reasons given above, we affirm the trial court's order granting certification for the following classes and for declaratory relief only:

> Class 1: The first class consists of those chiropractors who have ever applied for membership in BCN and were denied membership or whom BCN denied the opportunity to apply.
>
> Class 2: The second class consists of those chiropractors who at one time were members of BCN but who can show by objective proof that they were disaffiliated from BCN against their will.
>
> Class 3: The third class consists of those chiropractors who are, or have been, members of BCN and who have suffered harm because of BCN's policy of requiring its insureds to obtain a referral before seeing a chiropractor and BCN's open policy of discouraging referrals to chiropractors.
>
> Class 4: The fourth class consists of those chiropractors who have been economically harmed as a result of BCN's policies that unlawfully discriminate against chiropractors. These policies include, but are not limited to, refusing to reimburse chiropractors for services within their scope of work, reimbursing other providers for these same services, burdensome deductibles, and imposing burdensome copays on insureds who utilize chiropractors driving patients away from chiropractic care.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

METER and M. J. KELLY, JJ., concurred with FITZGERALD, P.J.

*In re* AJR

Docket No. 312100. Submitted March 5, 2013, at Grand Rapids. Decided April 18, 2013, at 9:20 a.m. Leave to appeal sought.

Petitioner-mother and respondent-father had one child, AJR, during their marriage. When they divorced, the divorce judgment gave the mother sole physical custody of the child, with both parents sharing joint legal custody. The mother subsequently remarried, and she and her new husband petitioned the Kent Circuit Court, Family Division, for the termination of the father's parental rights to allow the stepfather to adopt AJR. The court, Kathleen A. Feeny, J., terminated the father's parental rights under MCL 710.51(6) of the Adoption Code, finding that he had substantially failed to provide support for AJR for the two years preceding the filing of the petition and had substantially failed to visit or communicate with AJR during that two-year period. The father appealed.

The Court of Appeals *held*:

Because the father and the mother had joint legal custody over the child, his parental rights were improperly terminated. MCL 710.51(6) acts only to terminate the rights of those parents who do not have legal custody and thus was not applicable to him. The statute provides that if the parents of a child are divorced, the parent having legal custody of the child subsequently remarries, and that parent's new spouse petitions to adopt the child, the court may terminate the parental rights of the other parent if he or she, despite having the ability, failed or neglected to provide regular and substantial support for the child or failed to substantially comply with a support order for two years or more before the filing of the petition and regularly and substantially failed to visit, contact, or communicate with the child during that period. Because the Legislature used the phrase "the parent having legal custody" in the statute rather than the phrase "a parent having legal custody," the statute requires that the parent initiating termination proceedings be the only parent having legal custody. The rights of a parent who maintains joint legal custody are not properly terminated under MCL 710.51(6). Thus, because the mother did not have sole

legal custody, the trial court erred when it terminated the father's rights under MCL 710.51(6) despite the fact that it found that both of the conditions in MCL 710.51(6)(a) and (b) regarding lack of support and communication were satisfied.

Reversed.

ADOPTION — TERMINATION OF PARENTAL RIGHTS — STEPPARENTS — PARENTS WITH JOINT CUSTODY.

MCL 710.51(6), the stepparent adoption statute, provides that if the parents of a child are divorced, the parent having legal custody of the child subsequently remarries, and that parent's new spouse petitions to adopt the child, the court may terminate the parental rights of the other parent if he or she, despite having the ability, failed or neglected to provide regular and substantial support for the child or failed to substantially comply with a support order for two years or more before the filing of the petition and regularly and substantially failed to visit, contact, or communicate with the child during that period; the statute requires that the parent initiating termination proceedings be the only parent having legal custody, and the rights of a parent who maintains joint legal custody are not properly terminated under MCL 710.51(6), even if the court finds that both of the conditions regarding lack of support and communication were satisfied.

*Kelly A. Sobanski* for petitioner-mother and petitioner-stepfather.

*Haas & Associates, PLLC* (by *Trish Oleksa Haas*) for respondent-father.

Before: WILDER, P.J., and METER and RIORDAN, JJ.

WILDER, P.J. Respondent appeals as of right an order that terminated his parental rights to the minor child, AJR, under the stepparent adoption statute, MCL 710.51(6). The order also allowed petitioner-stepfather, who is married to AJR's mother, to adopt AJR. Because respondent had joint legal custody over the child, MCL 710.51(6) did not apply, and we reverse.

I

Respondent and petitioner-mother were married and had one child, AJR, during their marriage. The two later divorced, and in the divorce judgment, the mother was given sole physical custody of the child, with both parents sharing joint legal custody. The divorce judgment also provided that respondent would be given reasonable visitation with AJR.

Years later, the mother married petitioner-stepfather. Approximately two years into their marriage, petitioner-stepfather and petitioner-mother filed a petition for the termination of respondent's parental rights to allow petitioner-stepfather to adopt AJR. They alleged that respondent had failed to comply with a child-support order and failed or neglected to visit, contact, and communicate with AJR during the previous two years.

After conducting a two-day evidentiary hearing on the matter, the trial court terminated respondent's parental rights under MCL 710.51(6), finding that (1) respondent had substantially failed to provide support for AJR for the two years preceding the filing of the petition and (2) respondent had substantially failed to visit or communicate with AJR during this two-year period.

II

This case involves issues of statutory interpretation, which are questions of law that we review de novo. *Douglas v Allstate Ins Co*, 492 Mich 241, 255-256; 821 NW2d 472 (2012). When interpreting a statute, our primary goal is to ascertain and to give effect to the intent of the Legislature. *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 217; 801 NW2d 35 (2011). This task begins by examining the language of the statute itself because that language provides the

most reliable evidence of the Legislature's intent. *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n*, 484 Mich 1, 13; 795 NW2d 101 (2009). "If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). "We presume that every word of a statute has some meaning and must avoid any interpretation that would render any part of a statute surplusage or nugatory. As far as possible, effect should be given to every sentence, phrase, clause, and word." *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 132; 807 NW2d 866 (2011) (citation omitted). Additionally, this Court may not ignore the omission of a term from one section of a statute when that term is used in another section of the statute. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993).

III

Respondent argues that the statute under which his parental rights were terminated was not applicable to him. Specifically, respondent maintains that because he and the mother had joint legal custody over the child and the statute only acts to terminate the rights of those parents who do not have legal custody, his rights were improperly terminated. We agree.

Respondent did not raise this issue in the trial court, thus failing to preserve the issue for appellate review. *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011). However, "[t]his Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if

the issue involves a question of law and the facts necessary for its resolution have been presented." *Nuculovic v Hill*, 287 Mich App 58, 63; 783 NW2d 124 (2010). The issue presented here is strictly an issue of law—statutory interpretation—and all the requisite facts have been presented. Thus, in the interests of justice, we will review the issue.

The statute at issue is MCL 710.51(6), which allows for the termination of the rights of a noncustodial parent during a stepparent adoption. MCL 710.51(6) provides as follows:

> If the parents of a child are divorced, . . . and if the parent having *legal custody* of the child subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur:
>
> (a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a support order has been entered, has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition.
>
> (b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition. [Emphasis added.]

Thus, in order to terminate parental rights under MCL 710.51(6), the trial court must determine that both subdivision (a) and subdivision (b) are satisfied, *In re Hill*, 221 Mich App 683, 692; 562 NW2d 254 (1997), as well as conclude that the conditions set out in the preceding paragraph have been satisfied. See *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 529; 672 NW2d 181 (2003) (noting that phrases starting with "if" are provisos that restrict the operative effect of statutory language).

We conclude and hold that the statute's language, "if *the* parent having legal custody of the child," is to be construed as requiring the parent initiating termination proceedings to be *the only parent* having legal custody. The rights of a parent who maintains joint legal custody are not properly terminated under MCL 710.51(6).

The Legislature's decision to use the phrase "*the* parent having legal custody," rather than the phrase "*a* parent having legal custody," is dispositive because, as our Supreme Court has explained, the terms "the" and "a" have different functions:

> "The" and "a" have different meanings. "The" is defined as "definite article. 1. (used, esp. before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an). . . ." *Random House Webster's College Dictionary*, p 1382. [*Massey v Mandell*, 462 Mich 375, 382 n 5; 614 NW2d 70 (2000).]

Indeed, if the Legislature wants to refer to something particular, not general, it uses the word "the," rather than "a" or "an." See *Johnson v Detroit Edison Co*, 288 Mich App 688, 699; 795 NW2d 161 (2010). Here, the Legislature's use in MCL 710.51(6) of "the" refers to *the particular* parent having legal custody. Necessarily, this requires the particular parent to have sole legal custody. As such, the Legislature's use of the word "the" rather than "a" controls the question before us.

Our interpretation is supported by *Paige v Sterling Hts*, 476 Mich 495; 720 NW2d 219 (2006), in which our Supreme Court interpreted the use of "the" in the phrase "the proximate cause" found in MCL 418.375(2).[1] The

[1] MCL 418.375(2) of the Worker's Disability Compensation Act, MCL 418.101 *et seq.*, states the following: "If the injury received by such employee was *the proximate cause* of his or her death . . . ." (Emphasis added.)

*Paige* Court held that "*the* proximate cause" refers to "the *sole* proximate cause." *Id*. at 510 (emphasis added). The *Paige* Court adopted the reasoning of the Court in *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000), which held that it was "clear that the phrase 'the proximate cause' contemplates *one* cause." *Paige*, 476 Mich at 508. Similarly, we conclude that the Legislature's use of "the parent having legal custody," with "the" being a definite article and "parent" being a singular noun, contemplates only *one* parent having legal custody.

Our interpretation of MCL 710.51(6) is further strengthened by the rules of statutory construction that every word and phrase in a statute is to be given effect, if possible, and that this Court should not ignore the omission of a term from one section of a statute when that term is used in another section of the statute. See *Farrington*, 442 Mich at 210. Notably, the preceding subsection in the statute, MCL 710.51(5), uses the phrase "*a* parent having legal custody" to refer to whom that particular subsection applies. Contrastingly, MCL 710.51(6) refers to "*the* parent having legal custody." We presume that the Legislature intended to use the more general phrase "*a* parent" to refer to either of the child's parents in MCL 710.51(5) and that the omission of a general article in MCL 710.51(6) was intentional. *Id*.; see also *Robinson v City of Lansing*, 486 Mich 1, 14 n 13; 782 NW2d 171 (2010), quoting MCL 8.3a (stating that reviewing courts "must follow these distinctions between 'a' and 'the' because the Legislature has directed that '[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language' ").

It is undisputed that when respondent and AJR's mother divorced, the divorce judgment provided that

the mother was awarded physical custody of the child, but both parents would maintain joint legal custody. Thus, because the mother did not have sole legal custody, the trial court erred when it terminated respondent's rights under MCL 710.51(6), regardless of the fact that it found that both of the conditions in subdivisions (a) and (b) were satisfied. Because we are reversing on this ground, respondent's other arguments are moot, and we need not address them. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

Reversed.

METER and RIORDAN, JJ., concurred with WILDER, P.J.

TIENDA v INTEGON NATIONAL INSURANCE COMPANY

Docket No. 306050. Submitted April 5, 2013, at Lansing. Decided April 23, 2013, at 9:00 a.m. Leave to appeal sought.

Gerardo Lorenzo Tienda and Silvia Lopez Gomez brought an action in the Allegan Circuit Court against Integon National Insurance Company, seeking first-party personal protection insurance (PIP) benefits arising out of an accident that occurred while they were passengers in a vehicle owned and insured by Tienda's uncle, Salvador Lorenzo. Plaintiffs also applied for benefits through the Assigned Claims Facility, which assigned the claim to Titan Insurance Company. Lorenzo was licensed to drive in Michigan, but Integon had issued him an insurance policy at an address in North Carolina, where he and plaintiffs were working as migrant farm laborers. The three had spent several years moving from Florida to North Carolina to Michigan and back depending on which crops were in season, and they generally lived in quarters provided by their employers. At the time of the accident, they were living in an apartment they had rented within a complex located in Grand Rapids that was reserved during the harvest season for migrant farm workers who would be given different apartments upon their return each year. Integon stopped paying no-fault benefits to plaintiffs after taking the position that Lorenzo was a Michigan resident at the time of the accident and, under MCL 500.3163(1), it was only obligated to pay for injuries or property damage that occurred in Michigan if the owner of the vehicle was a resident of another state. The court, Kevin W. Cronin, J., permitted Titan to intervene. Integon filed a cross-claim against Titan, seeking a declaratory judgment that Titan was responsible for paying the PIP benefits and seeking recoupment of the benefits that Integon had already paid. Titan filed a counterclaim against Integon, arguing that Lorenzo was a resident of North Carolina when he bought the policy and at the time of the accident, and that if Lorenzo was a Michigan resident, Integon was on notice of this by virtue of Lorenzo's Michigan driver's license and should therefore be estopped from denying coverage for plaintiffs' injuries. Integon and Titan moved for summary disposition pursuant to MCR 2.116(C)(10). The court denied Integon's motion and granted Titan's motion, ruling that Integon was obligated to pay for

plaintiffs' benefits regardless of Lorenzo's place of residence and that, if Lorenzo's residency was at issue pursuant to MCL 500.3163, Lorenzo was not a Michigan resident but rather a resident of Florida, because he spent more months of the year in that state. The court further ruled that, as innocent third parties, plaintiffs were entitled to benefits under the Integon policy pursuant to the financial responsibility act, MCL 257.501 *et seq*. The court also ordered Integon to pay plaintiffs costs and fees of $21,683.61 as a penalty for its unreasonable refusal to timely pay no-fault benefits. Integon appealed.

The Court of Appeals *held*:

1. The court erred by ruling that Lorenzo's residency was not relevant for purposes of determining whether Integon was obligated to pay plaintiffs' benefits. Integon sells auto insurance in Michigan, and the plain language of MCL 500.3163(1) provides that an insurer authorized to transact automobile liability insurance and personal and property protection insurance in Michigan is subject to Michigan's no-fault system for accidents that arise from the ownership of a vehicle by an out-of-state resident. Given that Titan would be the priority insurer through the Assigned Claims Facility under MCL 500.3172(1) if Lorenzo was a resident of Michigan at the time of the accident, his place of residency was the dispositive question.

2. The court erred by concluding as a matter of law that Lorenzo's residence was in Florida, despite the fact that he spent more months of the year in that state, given that he lived in temporary migrant housing there, he intended to leave in May, he had no documents linking him to Florida, and he maintained no room or possessions there when he left. Although Lorenzo had no intent to remain in Michigan permanently, he had held a Michigan driver's license for several years, intended to stay in Michigan for the foreseeable future, rented an apartment in Michigan that was not provided by his employer, had no other place of lodging, kept no belongings elsewhere, had no other address at which he received mail or other documents, and stated that he lived in Michigan at the time of the accident. Under these unique facts, when the accident occurred, Lorenzo was a resident of Michigan as a matter of law. Accordingly, Titan was the priority insurer responsible for paying plaintiffs' no-fault benefits.

3. The court's order awarding plaintiffs costs and fees under MCL 500.3148 for Integon's failure to pay plaintiffs' no-fault benefits was vacated because a delay is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty. The case was remanded to

determine whether plaintiffs were otherwise entitled to fees or costs from Titan under the court's prior order directing Titan to temporarily pay plaintiffs' no-fault benefits.

Order awarding costs and fees vacated; judgment reversed and case remanded for further proceedings.

*Koning & Jilek, P.C.* (by *James H. Koning* and *Jonathan N. Jilek*), for Gerardo Lorenzo Tienda and Silvia Lopez Gomez.

*Garan Lucow Miller, P.C.* (by *Daniel S. Saylor*), for Integon National Insurance Company.

*Law Offices of Ronald M. Sangster PLLC* (by *Ronald M. Sangster, Jr.*) for Titan Insurance Company.

Before: BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ.

SAAD, J. Defendant Integon National Insurance Company appeals the trial court's order denying its motion for summary disposition and granting summary disposition in favor of intervening defendant Titan Insurance Company. For the reasons set forth below, we reverse and remand.

## I. NATURE OF THE CASE

The answer to the question of which insurer, Integon or Titan, is responsible for personal protection insurance (PIP) benefits arising out of a Michigan automobile accident depends on where the insured, Salvador Lorenzo, resided at the time of the accident. Because of its peculiar facts, this case raises a question of first impression because Lorenzo, an itinerant agricultural worker, did not have a "permanent" residence in any state, but lived, worked, and resided in three different states where he picked fruit on a seasonal basis. At the time of the accident, Lorenzo lived and worked in

Michigan, had all his possessions with him in Michigan, and had no other residence or place he looked to or could be regarded as his home. Accordingly, for purposes of the no-fault act, Lorenzo was a resident of Michigan, and neither his out-of-state policy with Integon nor Integon's choice to also do business in Michigan makes Integon liable for plaintiffs' no-fault benefits. Instead, and contrary to the trial court's ruling, Titan is the insurer responsible for the payment of plaintiffs' PIP benefits as the carrier assigned by the Assigned Claims Facility.

## II. FACTS AND PROCEEDINGS

This case arises out of an auto accident that occurred July 29, 2009, on I-196 in Allegan County. Plaintiffs, Gerardo Tienda and Sylvia Gomez, were passengers in a Ford Expedition owned by Tienda's uncle, Lorenzo. When the accident occurred, Lorenzo was also riding in the vehicle and Heriberto Fernandez Castro was driving. Tienda, Gomez, Lorenzo, and Castro are migrant farm workers who travel from state to state to harvest fruit. From October 2008 until May 2009, the four worked in Florida where they picked strawberries and then pulled the strawberry plants after the harvest. From May 2009 until early July, the four lived together on or near a farm in North Carolina where they harvested blueberries. Around July 4, 2009, Lorenzo drove Tienda, Gomez, and Castro in his Expedition to Michigan, they rented an apartment together in Grand Rapids, and drove together each day to a farm in Allegan County to harvest blueberries. Plaintiffs and Lorenzo testified that, before the accident, they traveled to the same states and performed the same work for many years. Though the four generally lived in housing provided to migrant workers for the harvest

season, they found the Grand Rapids apartment after inquiring about available housing at a Mexican grocery store. It appears the accident occurred after work one day when the four were returning to their Grand Rapids apartment.

Before the accident, on June 22, 2009, Integon issued a North Carolina auto insurance policy to Lorenzo. When he applied for the policy, Lorenzo had a driver's license issued by the state of Michigan. The license showed Lorenzo's address as 66400 84th Avenue, Apartment 3, in Hartford, Michigan. Evidence established that this apartment complex was reserved for migrant farm workers during the harvest season, and that workers who returned to harvest in that area were given different apartments each year within the complex. Lorenzo stated that he received the driver's license approximately eight years before he testified in 2011. However, on the Integon auto insurance application, Lorenzo listed his address as 115 Juan Sanchez Lane in Teachey, North Carolina and, again, it appears this address was temporary housing for migrant farm workers. Integon denied Lorenzo's claim for benefits under its North Carolina insurance policy because, among other reasons, it maintained that Lorenzo was a Michigan resident at the time of the accident, he did not insure the vehicle with Michigan no-fault insurance, and he misrepresented the primary garaging location of the vehicle as his address in North Carolina, when he knew he planned to take the Expedition to Michigan.

Integon initially paid no-fault benefits to Tienda and Gomez, but stopped because it took the position that, at the time of the accident, Lorenzo was a Michigan resident and, under MCL 500.3163(1), Integon was only obligated to pay for injuries or property damage occurring in Michigan if the owner of the vehicle is a resident

of another state. Plaintiffs filed this action against Integon and asserted that Integon must pay first-party PIP benefits, but that Integon refused to pay and unreasonably delayed paying the benefits. Plaintiffs also applied for benefits through the Assigned Claims Facility, which assigned the claim to Titan. See MCL 500.3171 *et seq*. The trial court permitted Titan to intervene in this action on June 14, 2010. Integon filed a cross-claim against Titan, seeking a declaratory judgment that Titan was responsible for PIP benefits owed to plaintiffs and seeking recoupment of the benefits it had already paid to plaintiffs. Titan filed a counterclaim against Integon, and argued that Lorenzo was a resident of North Carolina when he bought the policy and at the time of the accident, and that if Lorenzo was a Michigan resident, Integon was on notice of this by virtue of Lorenzo's Michigan driver's license and, therefore, Integon should be estopped from denying coverage for plaintiffs' injuries.

Integon and Titan moved for summary disposition pursuant to MCR 2.116(C)(10), each claiming that the other company was responsible for paying no-fault benefits to Tienda and Gomez. The trial court ultimately denied Integon's motion and granted Titan's motion. The court first ruled that Lorenzo's place of residence was irrelevant and that Integon was obligated to pay for plaintiffs' injuries, stating that it "cannot endorse a decision in this case that makes the recovery of benefits by [plaintiffs] depend on Mr. Lorenzo's residency." Before ruling, the court remarked that "[e]verybody has to be determined to be a resident of some place . . . ." The court went on to rule that, if Lorenzo's residency was at issue pursuant to MCL 500.3163, Lorenzo was not a Michigan resident because he had no intent to reside in Michigan permanently and he had no greater connection to Michigan than the

other states in which he worked. The court cited the factors set forth in *Workman v DAIIE*, 404 Mich 477; 274 NW2d 373 (1979), and *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675; 333 NW2d 322 (1983), and concluded that Lorenzo was a resident of Florida because he spent more months during the year in Florida. Comparing Lorenzo's situation to that of a professional baseball player who travels to other states for games, the court noted that Integon's position that Lorenzo was a Michigan resident would also mean that baseball players change residency each time they stay at a hotel in a different city. The court rejected this notion and further ruled that, as innocent third parties, plaintiffs were entitled to benefits under the Integon policy pursuant to the financial responsibility act, MCL 257.501 *et seq*. The court issued an order denying Integon's motion and granting summary disposition to Titan on April 14, 2011. The court also signed an order on August 23, 2011, that directed Integon to pay plaintiffs costs and fees of $21,683.61 as a penalty for its unreasonable refusal to pay, and its delay in paying, no-fault benefits.

## III. DISCUSSION

As this Court explained in *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 291; 778 NW2d 275 (2009):

> This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30-31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, plead-

> ings, and admissions in the light most favorable to the nonmoving party. *Id*. We also review de novo issues of contract interpretation. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

This case also requires us to interpret sections of the no-fault act. Our Supreme Court opined in *Douglas v Allstate Ins Co*, 492 Mich 241, 255-256; 821 NW2d 472 (2012):

> "Issues of statutory interpretation are questions of law that this Court reviews de novo." [*Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005).] When interpreting a statute, we must "ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." [*Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).] This requires courts to consider "the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " [*Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999), quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995).] If the statutory language is unambiguous, "the Legislature's intent is clear and judicial construction is neither necessary nor permitted." [*Griffith*, 472 Mich at 526, citing *Koontz*, 466 Mich at 312.]

We hold that the trial court erred when it ruled that Lorenzo's residency is not relevant for purposes of determining Integon's obligation to pay plaintiffs' benefits. While Lorenzo bought a North Carolina auto insurance policy from Integon,[1] Integon also sells auto

[1] As noted, Integon denied Lorenzo's claim for benefits, and he did not litigate the matter. As one reason for the denial, Integon cited MCL 500.3113(b), which provides that a person is not entitled to PIP benefits if, at the time of the accident, "[t]he person was the owner or registrant of a motor vehicle . . . involved in the accident with respect to which the security required by [MCL 500.3101] . . . was not in effect." MCL 500.3101(1) provides that a Michigan resident "shall maintain security

insurance in Michigan. Accordingly, Integon filed a certificate of compliance pursuant to MCL 500.3163(1), which provides:

> An insurer authorized to transact automobile liability insurance and personal and property protection insurance in this state shall file and maintain a written certification that any accidental bodily injury or property damage occurring in this state arising from the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle *by an out-of-state resident* who is insured under its automobile liability insurance policies, is subject to the personal and property protection insurance system under this act. [Emphasis added.]

This statute subjects the insurer and insured to "the rights and immunities under the no-fault act for personal and property protection . . . ." *Tevis v Amex Assurance Co*, 283 Mich App 76, 85; 770 NW2d 16 (2009).[2] The plain language of the statute states that Integon is subject to Michigan's no-fault system if the accident arose from, in this case, the ownership of a vehicle by an "*out-of-state resident*." Our Court has held that, if the insured is not a nonresident, MCL 500.3163 has no application and may not be used to impose responsibility for payment of PIP benefits on an out-of-state insurer that maintains a written certification in Michi-

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for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance." According to Integon, Lorenzo was a Michigan resident, and he did not maintain adequate insurance under the Michigan no-fault act.

[2] The statute also provides that "*claimants* have the rights and benefits of personal and property protection insurance claimants, 'including the right to receive benefits from the electing insurer as if it were an insurer of personal and property protection insurance applicable to the accidental bodily injury or property damage.' " *Tevis*, 283 Mich App at 85, quoting MCL 500.3163(3). Integon grants that plaintiffs are "innocent third parties" and does not argue that they should be denied no-fault benefits, but maintains that Titan is the liable party under Michigan law.

gan. *Farm Bureau Ins Co v Allstate Ins Co*, 233 Mich App 38, 40-41; 592 NW2d 395 (1998). Indeed,

> the only conditions of carrier liability imposed under [MCL 500.3163] are (1) certification of the carrier in Michigan, (2) existence of an automobile liability policy between the nonresident and the certified carrier, and (3) a sufficient causal relationship between the nonresident's injuries and his or her ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle. [*Transport Ins Co v Home Ins Co*, 134 Mich App 645, 651-652; 352 NW2d 701 (1984).]

Thus, the residency of the owner of the vehicle involved in the collision, Lorenzo, is the central, dispositive question in this case. If Lorenzo was a resident of Michigan at the time of the accident, Titan would be the priority insurer through the Assigned Claims Facility, pursuant to MCL 500.3172(1). Therefore, to the extent the trial court based its ruling on the premise that Lorenzo's residency was irrelevant, its holding was erroneous.

The trial court also based its imposition of liability on Integon on the ground that Lorenzo was a resident not of Michigan but of Florida and was, therefore, an out-of-state resident under MCL 500.3163 when the accident occurred.

"Generally, the determination of domicile is a question of fact. However, where . . . the underlying facts are not in dispute, domicile is a question of law for the court." *Fowler v Auto Club Ins Ass'n*, 254 Mich App 362, 364; 656 NW2d 856 (2002). As noted, in its decision from the bench, the trial court cited the factors set forth in *Workman*, 404 Mich at 496-497, and *Dairyland*, 123 Mich App at 682. In *Workman*, our Supreme Court considered whether a passenger injured in an auto accident could recover from her father-in-law's insurance company as a relative "domiciled in the same

household" under MCL 500.3114(1). *Workman*, 404 Mich at 493. The Court first ruled that, for purposes of the no-fault act in Michigan, "the terms 'domicile' and 'residence' are legally synonymous . . . ." *Id*. at 495. See also *Campbell v White*, 22 Mich 178, 197 (1871) (" 'Ordinarily one's residence and domicile (if they do not always mean the same thing) are in fact the same, and where they so concur they are that place which we all mean when we speak of one's home.' ") (Citation omitted.) The *Workman* Court further observed that "[t]he 'legal meaning' of these terms must be viewed flexibly, 'only within the context of the numerous factual settings possible'." *Workman*, 404 Mich at 496, quoting *Montgomery v Hawkeye Security Ins Co*, 52 Mich App 457, 461; 217 NW2d 449 (1974). The *Workman* Court set forth the following nonexhaustive list of factors to determine whether a person resides or is domiciled in an insured's household:

> (1) the subjective or declared intent of the person of remaining, either permanently or for an indefinite or unlimited length of time, in the place he contends is his "domicile" or "household"; (2) the formality or informality of the relationship between the person and the members of the household; (3) whether the place where the person lives is in the same house, within the same curtilage or upon the same premises; (4) the existence of another place of lodging by the person alleging "residence" or "domicile" in the household . . . . [*Workman*, 404 Mich at 496-497 (citations omitted).]

"In considering these factors, no one factor is, in itself, determinative; instead, each factor must be balanced and weighed with the others." *Id*. at 496.

Similarly, in *Dairyland*, this Court considered factors to determine whether a minor child was domiciled with the child's parents for purposes of coverage

under MCL 500.3114. *Dairyland*, 123 Mich App at 678-679. The Court took note of the *Workman* factors, but stated that

> [o]ther relevant indicia of domicile include such factors as whether the claimant continues to use his parents' home as his mailing address, whether he maintains some possessions with his parents, whether he uses his parents' address on his driver's license or other documents, whether a room is maintained for the claimant at the parents' home, and whether the claimant is dependent upon the parents for support. [*Id*. at 682.]

Certainly, the question whether a relative resides in an insured's home differs from the question of an insured's place of residence, but some of the factors cited in *Workman* and *Dairyland* are nonetheless instructive on the issue. We are also mindful of other factual circumstances in which our courts have considered the question of domicile and residency. In *Henry v Henry*, 362 Mich 85, 101-102; 106 NW2d 570 (1960), our Supreme Court employed the United States Supreme Court's formulation of "domicile" as "that place where a person has voluntarily fixed his abode not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time." (Citations and quotation marks omitted.) Our Supreme Court has also explained that "[r]esidence means the place where one resides; an abode, a dwelling or habitation; especially, a settled or permanent home or domicile. Residence is made up of fact and intention." *Reaume & Silloway, Inc v Tetzlaff*, 315 Mich 95, 99; 23 NW2d 219 (1946) (citation and quotation marks omitted).

> [I]t may safely be asserted that where one has a *home*, as that term is ordinarily used and understood among men, and he habitually resorts to that place for comfort, rest and relaxation from the cares of business, and restoration to

> health, and there abides in the intervals when business does not call—that is his residence, both in the common and legal meaning of the term. [*Campbell*, 22 Mich at 197-198 (citation omitted).]

Some published cases address the question of residency under MCL 500.3163 in other factual contexts, but they do not address the question of residency for seasonal agricultural workers. *Farm Bureau v Allstate*, 233 Mich App 38, involved a person insured by Allstate who spent time in both Michigan and Indiana. This Court affirmed the trial court's ruling that the insured was a Michigan resident because facts showed that she

> spent a significant amount of time at the Cass County, Michigan, Chain Lakes Road residence, that she frequently slept at this residence, that she received public assistance from the state of Michigan and that the public assistance checks were mailed to the Chain Lakes Road residence, the infrequency of Allstate's insured's stays with relatives in Elkhart, Indiana, and the fact that her children's school had the telephone number of the Chain Lakes Road residence as a number to use to contact Allstate's insured in the case of an emergency. [*Id*. at 40.]

In *Witt v American Family Mut Ins Co*, 219 Mich App 602, 605-606; 557 NW2d 163 (1996), the plaintiff insured his vehicle while living in Iowa and the vehicle was registered in Iowa, but, for purposes of MCL 500.3163, this Court ruled that the plaintiff was a Michigan resident:

> Plaintiff moved to this state in 1990, and he has since continuously lived and worked here. Plaintiff has been registered to vote in Michigan since 1990, has maintained bank and checking accounts here, and has a Michigan telephone number. Michigan residency is declared in his state and federal income tax returns, and his employment records describe his residence as Michigan. Plaintiff has a Michigan identification card and used it to obtain a Michigan hunting license as a resident. From 1990 to 1992, he

> spent a total of only two weeks in Iowa, visiting during holidays. He owns no property there, has paid no rent to and received no support from his parents since 1990, has no telephone listing there, and with the exception of a student loan bill sent to his parents' home, all his mail since 1990 has gone to a Michigan mailing address. At his deposition, plaintiff stated that, at the time of the accident, he wanted to work as a "rover," but he had no specific plan to move anywhere else until that opportunity arose. While plaintiff still had an Iowa bank account and driver's license, these factors were, on balance, insufficient to create a genuine issue of fact.

There are few published cases in Michigan that address the residency of migrant agricultural workers like Lorenzo and, as noted, none that addresses that issue for purposes of MCL 500.3163. In *Soto v Director of the Mich Dep't of Social Servs*, 73 Mich App 263; 251 NW2d 292 (1977), the Department of Social Services denied the plaintiff's initial application for Aid to Dependent Children (ADC) because the plaintiff was not a resident of Michigan when he applied. *Id*. at 266. The plaintiff had traveled from Texas with his wife and three of his four children to pick fruit at a farm in Berrien County. *Id*. Because of an illness, the plaintiff was unable to continue working on the farm, and the family applied for ADC benefits. *Id*. The plaintiff and his family later decided to establish permanent residence here, and his application for ADC benefits was ultimately granted. *Id*. at 266-267. The plaintiff nevertheless contested the first denial of benefits, but the trial court upheld the decision on the ground that the initial denial was supported by substantial evidence on the whole record. *Id*. at 267, 269. In reviewing the trial court's decision, this Court cited the Michigan Department of Social Services Assistance Payment Manual, which relied on 45 CFR 233.40(a)(1)(2) for the definition of a "resident":

> "(1) A resident of a State is one who is living in the State voluntarily with the intention of making his home there and not for a temporary purpose. A child is a resident of the State in which he is living other than on a temporary basis. Residence may not depend upon the reason for which the individual entered the State, except insofar as it may bear upon whether he is there voluntarily or for a 'temporary purpose'.
>
> "(2) Residence is retained until abandoned. Temporary absence from the State, with subsequent returns to the State, or intent to return when the purposes of the absence have been accomplished, does not interrupt continuity of residence." [*Soto*, 73 Mich App at 269, quoting 45 CFR 233.40(a)(1)(2) (1976).]

This Court observed that "[t]his definition also accords with the normal definition of residency used for other purposes in Michigan." *Soto*, 73 Mich App at 269. The Court affirmed the trial court's ruling that, when the plaintiff first applied for ADC benefits, he was not a Michigan resident because he had come to Michigan for the limited purpose of picking fruit during the harvest season, he maintained a home in Texas in which one of his children continued to live, he sent rent money to the landlord in Texas, he kept all of the family's furniture in Texas, he continued to make payments on a lot he was buying in Texas, he lived in temporary migrant housing on the farm in Michigan, he was treated at the migrant clinic, he applied for and received emergency assistance as a migrant, and he received food stamps at the migrant food-stamp office. *Id*. at 270-272. This case, of course, is different because, while the question of residency remains the same, the no-fault law is implicated and, while Lorenzo picked fruit on a seasonal basis, he maintained no other residence when he lived in Michigan and he took all of his worldly belongings with him when he traveled to each of three states to work.

"[I]t has long been the law of this state that '[e]very person must have a domicile somewhere.' " *People v Dowdy*, 489 Mich 373, 385; 802 NW2d 239 (2011), quoting *Beecher v Common Council of Detroit*, 114 Mich 228, 230; 72 NW 206 (1897). As the Court in *Beecher* further opined:

> The domicile is acquired by the combination of residence and the intention to reside in a given place, and can be acquired in no other way. The residence which goes to constitute domicile need not be long in point of time. If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile. [*Beecher*, 114 Mich at 230 (citation omitted).]

Therefore, we cannot simply conclude that, because Lorenzo traveled a circuit of three states throughout the year, he has no domicile or place of residence. Moreover, no evidence was presented to show that Lorenzo had any fixed or permanent home outside the three states in which he worked during the picking seasons. Accordingly, we must consider the evidence presented and determine whether the trial court correctly concluded that, as a matter of law, Lorenzo's residence was in Florida. We hold that the trial court erred in this holding.[3]

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[3] We note that tens of thousands of migrant workers come to this state each year to harvest crops, and, if they own or operate a motor vehicle in Michigan, they must be aware of, and abide by, the no-fault act. Michigan residents must register their vehicles and maintain adequate insurance under the act, and out-of-state residents must obtain Michigan no-fault coverage if they operate a vehicle in Michigan for more than 30 days in a calendar year pursuant to MCL 500.3102(1). In other words, although not at issue here because Lorenzo had not yet operated the vehicle in Michigan for 30 days when the accident occurred, if he was, indeed, a resident of Florida, it was incumbent on him to maintain no-fault insurance coverage if he did drive the vehicle in Michigan for more than 30 days. Failure to carry no-fault coverage is a misdemeanor under MCL

As discussed, Lorenzo purchased the North Carolina insurance policy while living in housing reserved for migrant workers on or near a farm in North Carolina, and he gave that address when he filled out his application. At the same time, he held, for several years, a driver's license issued by the state of Michigan. In determining his residence, the *Workman* and *Dairyland* factors only partially assist in our analysis. With regard to Lorenzo's intent, when he moved to Grand Rapids in early July 2009, Lorenzo had no intent to remain in Michigan permanently, but intended to make Grand Rapids his home until October. Thereafter, Lorenzo planned to continue, and did continue, to travel the same circuit between Michigan, Florida, and North Carolina, as he had done for several years. With the regularity of the blueberry and grape harvest seasons, Lorenzo stayed in Michigan, and intended to do so for the foreseeable future. *Workman* contemplates the formality of the relationship of the person claiming residence with others in the household and also inquires whether they lived on the same premises but, although Lorenzo traveled to Michigan with plaintiffs, rented an apartment with them, and worked at the same farm, their relationship is immaterial because determining whether Integon or Titan is primarily responsible to pay benefits does not depend on whether the workers shared a common household. Again, however, no evidence showed that Lorenzo had any other place of lodging or any other location at which he kept any belongings or had a room maintained for him.

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500.3102(2), and a conviction carries a mandatory fine of $200 to $500 and/or imprisonment for up to a year. Thus, for people who travel to Michigan for, as here, three to four months out of each year for agricultural work or other reasons, they must carry no-fault insurance coverage as a matter of law or face criminal penalties.

Viewing the evidence under the *Dairyland* decision, we note that Lorenzo never had a bank account and, while in Michigan, he would cash his checks at a liquor store near the blueberry farm. He did not receive or pay bills at the address in Grand Rapids, but would pay the landlord in cash and used a cellular phone with a prepaid card. However, Lorenzo had no other address at which he received any mail or other documents. Lorenzo cannot read or speak English, so his son either signed the lease or helped him rent the apartment in Grand Rapids with Tienda, Gomez, and Castro. While Lorenzo generally stayed in migrant housing on or near the farms at which he worked—for example, in Teachey, North Carolina; in Dover or Plant City, Florida; and at the address on his driver's license in Hartford, Michigan—the apartment he rented in Grand Rapids was several miles away from the blueberry farm, and evidence showed it was not part of any housing provided by the farm at which he and the others were employed.

The trial court reasoned that Lorenzo's residence was in Florida at the time of the accident because he spent more time there, apparently because the strawberry season was longer and Lorenzo could continue his work there by clearing the fields after the harvest ended. But, under these facts, the duration of time Lorenzo lived in Florida is of little consequence, because he lived in temporary migrant housing there, fully intended to leave in May, had no documents linking him to Florida, and maintained no room or possessions there when he left. Further, although Lorenzo had a Michigan driver's license, he did not have any certification linking him to a Florida address or residency. The same could be said for North Carolina, where Lorenzo applied for auto insurance but lived in temporary

migrant housing and never intended to "garage" his car for purposes of North Carolina policy coverage.

We find inapposite the trial court's comparison of Lorenzo to a professional baseball player who travels for games throughout the season. As noted, the trial court reasoned that, if these migrant workers changed their place of residency each time they moved, professional baseball players would also change residency each time they stayed in a new hotel room while on the road. As Integon points out, professional baseball players maintain permanent homes and do not carry with them all of their possessions when they play away games. We think Integon's analogy is more apt: "[I]f a journeyman ballplayer were traded regularly from one team to another, season after season, and even arriving at a new team's city with a full expectation that, following that season, he will be traded somewhere else, his state of residency undoubtedly would change each time he moved, unless he maintained a permanent home base throughout all the moves -- which the persons involved in the case at bar did not." (Emphasis removed.) Indeed, when Lorenzo or, for that matter, Tienda and Gomez were asked where they would say they lived at the time of the accident, they each responded that they lived in Michigan or that their fixed address was in Michigan. Indeed, they could not have responded otherwise because they had with them all of their worldly possessions and had no other place to call home.

It may appear that, given the nature of Lorenzo's itinerant lifestyle, his ties to Michigan appear as strong or as tenuous as his ties to North Carolina or Florida. However, under these unique facts, and for the reasons stated, we hold that, when the accident occurred on July 29, 2009, Lorenzo was a resident of Michigan as a

matter of law. Accordingly, we hold that the trial court erred when it ruled that Lorenzo was a resident of Florida, and it erred by denying Integon's motion for summary disposition and granting summary disposition to Titan. Because Lorenzo was a Michigan resident when the accident occurred, Titan is the priority insurer responsible for the payment of no-fault benefits to plaintiffs. We also vacate the trial court's order awarding plaintiffs costs and fees under MCL 500.3148 for Integon's failure to pay plaintiffs' no-fault benefits. See *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999) (stating that "a delay is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty"). We remand for further proceedings to determine whether plaintiffs are otherwise entitled to fees or costs from Titan under the court's prior order that directed Titan to temporarily pay plaintiffs' no-fault benefits.

Reversed and remanded. We do not retain jurisdiction.

BOONSTRA, P.J., and HOEKSTRA, J., concurred with SAAD, J.

NIEDERHOUSE v PALMERTON

Docket No. 310079. Submitted April 4, 2013, at Lansing. Decided April 23, 2013, at 9:05 a.m.

Conrad Niederhouse brought an action in the Roscommon Circuit Court against A. J. Palmerton (a Roscommon County deputy sheriff), Roscommon County, and Randall Stevenson (the county sheriff) after an airboat operated by Palmerton struck and injured him on a frozen lake during a winter festival. The Roscommon Sheriff's Department owned the airboat, and an on-duty sheriff's deputy had been giving rides to the public in it throughout the day as part of the festival. After that deputy had given his last ride at the end of the day, Palmerton, who was off duty, took his son, his mother, and two neighbor children out for a ride and injured Niederhouse while doing so. Defendants moved for summary disposition on the grounds of governmental immunity. The court, Thomas R. Evans, J., granted summary disposition in favor of each defendant. Niederhouse appealed, challenging only the grant of summary disposition to Palmerton and specifically limiting his appeal to whether Palmerton was acting in the course of his employment when the accident occurred.

The Court of Appeals *held*:

1. The governmental immunity act, MCL 691.1401 *et seq*., generally provides immunity from tort claims to governmental agencies engaged in a governmental function, as well as governmental officers, agents, or employees. MCL 691.1407(2) provides in part that each officer and employee of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer or employee while in the course of employment if certain other requirements are met. The necessary considerations for a course of employment are (1) the existence of an employment relationship, (2) the circumstances of the work environment created by the employment relationship, including the temporal and spatial boundaries established, and (3) the notion that the act in question was undertaken in furtherance of the employer's purpose.

2. Palmerton was acting in the course of his employment at the time of the accident. It was undisputed that an employment relation-

ship existed between the Roscommon County Sheriff's Department (a governmental agency) and Palmerton. Further, the circumstances of the work environment created by the employment relationship encompassed Palmerton's act of giving airboat rides at the festival. Although the festival was perhaps not within the typical temporal and spatial boundaries of Palmerton's employment, it was undisputed that his employer had requested that qualified deputies provide airboat rides to the public that day as part of the public relations activities of the sheriff's department. Relevant to this factor is whether the employee was performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. Had Palmerton not been in an employment relationship with the sheriff's department, he would not have been driving the airboat at the time of the accident. An injury arises out of the course of employment when it occurs as a circumstance of or incident to the employment relationship. The record demonstrated that Palmerton undertook driving the airboat in furtherance of his employer's purpose. He approached the deputy giving rides to see if that deputy needed any assistance. The sheriff indicated that he would have preferred to use one of the off-duty deputies, but all had declined, though Palmerton's plans subsequently fell through and he went to the festival with his family. The on-duty deputy would have given the airboat ride had Palmerton not offered to do so.

3. It was not dispositive that Palmerton's employer had not specifically instructed him to provide airboat rides that day. Indeed, even if an act is contrary to the employer's instructions, it may be within the course of employment if the employee accomplished the act in furtherance of or in the interest of the employer's business. Further, it was not dispositive that Palmerton was not compensated for his service because an employee's gratuitous work may still be within the course of his or her employment. Palmerton's operation of the airboat was in furtherance of his employer's purpose. Palmerton gave a ride to not only his own family, but two other children. Palmerton's relatives were members of the general public, as were the other children. The fact that Palmerton may have been motivated, at least in part, by a desire to give his family a ride on the airboat does not change the fact that the act performed was in furtherance of his employer's purpose.

Affirmed.

GOVERNMENTAL IMMUNITY — EMPLOYEES — INJURIES CAUSED IN THE COURSE OF EMPLOYMENT.

The governmental immunity act, MCL 691.1401 *et seq*., generally provides immunity from tort claims to governmental agencies

> engaged in a governmental function, as well as governmental officers, agents, or employees; MCL 691.1407(2) provides in part that each officer and employee of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer or employee while in the course of employment if certain other requirements are met; an injury arises out of the course of employment when it occurs as a circumstance of or incident to the employment relationship; the necessary considerations for a course of employment are (1) the existence of an employment relationship, (2) the circumstances of the work environment created by the employment relationship, including the temporal and spatial boundaries established, and (3) the notion that the act in question was undertaken in furtherance of the employer's purpose; whether the employee was performing work assigned by the employer or engaging in a course of conduct subject to the employer's control is relevant when considering the work environment; even if an act is contrary to the employer's instructions, it may be within the course of employment if the employee accomplished the act in furtherance of or in the interest of the employer's business; moreover, an employee's gratuitous work may still be within the course of his or her employment.

*Smith & Johnson, Attorneys, P.C.* (by *Bradley D. Wierda* and *Barbara A. Assendelft*), for plaintiff.

*Johnson, Rosati, Schultz & Joppich, P.C.* (by *Jason D. Kolkema*), for defendants.

Before: BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ.

BOONSTRA, P.J. Plaintiff appeals the trial court's grant of summary disposition to defendants on the grounds of governmental immunity. Plaintiff only challenges the trial court's ruling with respect to defendant A. J. Palmerton, and only insofar as the trial court held that Palmerton was acting "in the course of employment" when plaintiff was injured and therefore was entitled to qualified governmental immunity pursuant to MCL 691.1407(2). For the reasons stated in this opinion, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises out of an accident that occurred on February 20, 2010, on the frozen surface of Higgins Lake in Roscommon County. Plaintiff was out on the ice of the lake with a small group of people with snowmobiles during the "Winterfest" festival, which they had attended earlier. Plaintiff recalled observing an "airboat" on the ice when they first arrived at the festival, although he did not pay much attention to it.

During Winterfest, the Roscommon County Sheriff's Department provided rides in the airboat to the general public. Defendant Randall Stevenson, the Roscommon County Sheriff, had previously asked deputies who were trained in the airboat's operation and who would be off duty that day whether they would be willing to provide airboat rides at the festival; however, all the off-duty deputies had declined. Palmerton was one of those deputies; he declined because he had plans to visit family that day. Eventually Deputy Jeff Grieser, an on-duty officer, was chosen to provide the rides.

Palmerton's plans to visit relatives fell through, so he decided to take his family to Winterfest. Palmerton was not on duty that day. Palmerton and his family attended some activities at the festival. At some point, Palmerton stated that he went over to the airboat "to see if Deputy Grieser would need any assistance with" the airboat rides. Palmerton specifically testified that he "showed up to help out anyway." Palmerton brought his wife and son with him. Palmerton stated that he asked Grieser, "Hey, do you need any help?" and that Grieser responded that he was about to give his last ride of the day. Palmerton testified that Grieser appeared willing to give Palmerton's oldest child a ride in the airboat. Palmerton stated that some neighbors of his, the Schwartzes, who had two young boys, also approached

the airboat because their children wanted a ride. Palmerton stated that he told Grieser, "Oh, you've been driving it all day. I can take my family out" and that he told Grieser he would drive the airboat since he wanted to help him that day and "give him a break . . . ." Palmerton took his mother, his son, and the two Schwartz boys for a ride.

The airboat in question was gas-powered and propelled forward by a large rear-facing fan; the airboat does not have brakes. The responsiveness of the controls depends on numerous factors, including the type of terrain.

At the time Palmerton took his group out for an airboat ride, plaintiff and members of his group were standing on the ice around their snowmobiles about a quarter-mile away from Winterfest. Plaintiff stated that he had allowed his friend's daughter, Megan, to take his snowmobile for a ride. Plaintiff stated that Megan rode off in a westward direction on the snowmobile and that he noted that the airboat came between Megan and him. Plaintiff noticed that the airboat began to turn back around, but he did not pay a great deal of attention to it.

Palmerton testified that he took the airboat in a generally southwest direction for about 10 to 15 minutes before deciding to head back. Palmerton began to turn the airboat when he was about 150 feet past plaintiff's group; he stated that this distance was "well past what would normally be safe . . . ." As he made the turn, Palmerton stated that the snow "kind of grabbed" the airboat, and it ended up pointed directly at the group. Palmerton stated that he tried to turn the airboat in either direction with no success. As the airboat was still heading toward the group, Palmerton

decided to take his foot off the accelerator so that if there was a collision, it would be at a slow speed.

Plaintiff noticed that the airboat was coming closer, but did not feel that he was in any danger. The airboat struck a snowmobile and slid towards plaintiff, pinning his leg between the boat and a snowmobile. Plaintiff stated that the airboat was going no more than five miles per hour; Palmerton estimates that it was no more than four miles per hour. Plaintiff suffered a severe injury to his right knee that required two surgeries and resulted in total disability from his job as a sheriff's deputy for Crawford County.

Plaintiff filed suit against Palmerton, Roscommon County, and Stevenson. Plaintiff asserted a gross negligence claim against Palmerton and ordinary negligence claims against all the defendants. Plaintiff also asserted that his ordinary negligence claim was in avoidance of governmental immunity under the motor vehicle exception to governmental immunity, MCL 691.1405, and further that Roscommon County was not engaged in a governmental function.

Defendants responded by moving for summary disposition on the grounds of governmental immunity. Defendants principally argued that the airboat was not a motor vehicle, that Stevenson was entitled to absolute immunity as a high-ranking elected official, and that Palmerton had not been grossly negligent. In responding to defendants' motion, plaintiff argued in part that Palmerton was not acting in the course of his employment at the time of the accident.

After oral argument, the trial court granted summary disposition in favor of each defendant pursuant to MCR 2.116(C)(7). On appeal, plaintiff challenges only the grant of summary disposition to Palmerton and

specifically limits the appeal to whether Palmerton was acting in the course of his employment when the accident occurred.

## II. STANDARD OF REVIEW

This Court reviews de novo a trial court's grant of summary disposition under MCR 2.116(C)(7). *Oliver v Smith*, 290 Mich App 678, 683; 810 NW2d 57 (2010). In reviewing a motion for summary disposition under MCR 2.116(C)(7), a court considers the affidavits, pleadings, and other documentary evidence presented by the parties and accepts the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true. *Id*. "[T]he substance or content of the supporting proofs must be admissible in evidence." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The evidence submitted must be considered "in the light most favorable to the opposing party." *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011).

## III. COURSE OF EMPLOYMENT

The governmental immunity act, MCL 691.1401 *et seq*., generally provides immunity from tort claims to governmental agencies engaged in a governmental function, as well as governmental officers, agents, or employees. The relevant statutory provision, MCL 691.1407(2), provides:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to

> a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Although there was some discussion before the trial court about whether Palmerton was a volunteer under the statute, neither party argues on appeal that Palmerton was a volunteer for purposes of governmental immunity.[1] Instead, plaintiff presents a very narrow argument: that Palmerton was not acting in the course of his employment with the Roscommon County Sheriff's Department when the accident occurred. The trial court found that "at the point in time when he operated the airboat in question, [Palmerton] undertook that act during the course of his employment." The trial court further found that Palmerton "was acting within the scope of his authority," or reasonably believed that he was so acting, at the time of the accident.

This Court and our Supreme Court have often conflated the "course of employment" and "scope of his or her authority" requirements of MCL 691.1407(2). *Backus v Kauffman (On Rehearing)*, 238 Mich App 402, 406; 605 NW2d 690 (1999). However, this "does not

[1] Under the governmental immunity statute, " '[v]olunteer' means an individual who is specifically designated as a volunteer and who is acting solely on behalf of a governmental agency." MCL 691.1401(i). The trial court held that Palmerton did not meet this statutory definition, and that ruling is not contested on appeal.

mean . . . that our courts have concluded that the 'course of employment' and 'scope of his or her authority' requirements are coextensive." *Id*. at 407. Such a conclusion would, in fact, violate the rule of statutory construction that cautions courts to avoid construing statutory provisions so as to render portions of the statute surplusage. *Id*. Rather, courts tend to follow this approach when "the question whether the two requirements have been satisfied is easily disposed of." *Id*.

Plaintiff specifically limits his claim of error to the trial court's finding that Palmerton was acting in the course of his employment, not whether he was acting or reasonably believed he was acting within the scope of his authority. Plaintiff is correct that, absent a finding of "course of employment," a court would have no need to reach MCL 691.1407(2)(a). The plain language of the statute applies subdivisions (a) through (c) only to an "officer, employee, or member while in the course of employment or service" or a "volunteer while acting on behalf of a governmental agency." MCL 691.1407(2). Clear statutory language must be enforced as written. *Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432 (2012).

The necessary considerations for a course of employment are (1) the existence of an employment relationship, (2) the circumstances of the work environment created by the employment relationship, including the "temporal and spatial boundaries established," and (3) "the notion that the act in question was undertaken in furtherance of the employer's purpose." *Backus*, 238 Mich App at 407-408, citing, among other authorities, 2 Restatement Agency, 2d, §§ 228(1)(b) and (c), 233-235, pp 504, 516, 518, 520, and Black's Law Dictionary (7th ed), p 356.

We conclude that defendant was acting in the course of his employment at the time of the accident. It is undis-

puted that an employment relationship existed between the Roscommon County Sheriff's Department—a governmental agency—and Palmerton.

Further, the circumstances of the work environment created by the employment relationship encompassed Palmerton's act of giving airboat rides at Winterfest. Although Winterfest was perhaps not within the typical "temporal and spatial boundaries" of Palmerton's employment, it is undisputed that his employer requested that qualified deputies provide airboat rides to the public that day as part of the public relations activities of the sheriff's department. Relevant to this factor is whether the employee is "performing work assigned by the employer or engaging in a course of conduct subject to the employer's control." See 2 Restatement Agency, 3d, § 7.07(2), p 198. We conclude that Palmerton was. Further, had Palmerton not been in an employment relationship with the sheriff's department, he would not have been driving the airboat at the time of the accident. "An injury arises out of the course of employment when it occurs as a circumstance of or incident to the employment relationship." *Calovecchi v Michigan*, 223 Mich App 349, 352; 566 NW2d 40 (1997), aff'd 461 Mich 616 (2000). For these reasons, we hold that Palmerton's operation of the airboat to give rides to members of the public was within the circumstances of the work environment created by his employment relationship.

Finally, the record before this Court demonstrates that Palmerton undertook driving the airboat in furtherance of his employer's purpose. Palmerton stated that he approached Grieser to see if he needed any assistance with the airboat rides and asked him if he needed help. Further, as a qualified airboat operator, Palmerton had previously been asked by his employer

to assist with giving rides at the festival. In fact, Stevenson indicated that he would have preferred to use one of the off-duty deputies rather than Grieser, who was on duty. Additionally, Palmerton's deposition testimony supports the inference that Grieser would have given the airboat ride had Palmerton not offered to do so.

We do not find it dispositive that Palmerton was not specifically instructed by his employer to provide airboat rides that day. Indeed, even if an act is *contrary* to an employer's instructions, it may be within the course of employment if "the employee accomplished the act in furtherance, or [in] the interest, of the employer's business." *Hamed v Wayne Co*, 490 Mich 1, 11; 803 NW2d 237 (2011). Further, it is not dispositive that Palmerton was not compensated for his service, as an employee's gratuitous work may still be within the course of his employment. See 2 Restatement Agency, 3d, § 7.07(3)(b), p 198. We therefore hold that Palmerton's operation of the airboat was in furtherance of his employer's purpose.

In so holding, we find plaintiff's citation of *Saily v 500 Bushel Club*, 332 Mich 286; 50 NW2d 781 (1952), unpersuasive. In *Saily*, the employee in question was explicitly *not* acting in furtherance of her employer's purpose when she was attacked by a deer; in addition to being off duty, she was also "not engaged in anything for the benefit of the employer or incident to the employment" and was not, by virtue of her employment, "exposed to greater hazards of attacks by the deer than was common to any one happening in that locality for whatever purpose." *Id*. at 288-290. As stated, Palmerton's activity was in furtherance of his employer's purpose, and he would not have been involved in the accident had he not been in an employ-

ment relationship with the sheriff's department. Similarly, plaintiff's comparison to the unpublished case of *Bukowski v Mich Twp Participating Plan*, unpublished opinion per curiam of the Court of Appeals, decided October 18, 2005 (Docket No. 262564), p 3, is unpersuasive[2] because this Court found, under the circumstances of that case, that no benefit had accrued to the plaintiff's employer when the plaintiff was driving to work off duty and was not required to carry his weapon or required to respond to situations requiring police intervention. Thus, this Court found no reason not to apply the general rule that "an employee who is merely driving to work is not considered to be within the scope of his employment." *Id*., citing *Cambrun v Northwest Sch Dist/Jackson Community Sch (On Remand)*, 220 Mich App 358, 365; 559 NW2d 370 (1996). Palmerton, although off duty, was not merely driving to work and not merely entertaining himself while off duty, but was assisting Grieser in giving airboat rides in furtherance of his employer's purpose.

The basis of plaintiff's analogy to *Saily* and *Bukowski* is that Palmerton was merely "giving his family a ride" and was not acting in furtherance of his employer's goals. We disagree. As stated, Palmerton testified that he asked Grieser if he needed help with his task of giving airboat rides to the public. Palmerton eventually gave a ride to not only his own family, but two other children. Palmerton's relatives were members of the general public, as were the other children. The fact that Palmerton may have been *motivated*, at least in part, by a desire to give his family a ride on the

[2] Unpublished opinions of this Court have no precedential effect, but may be considered persuasive. MCR 7.215(C)(1); *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).

airboat does not change the fact that the *act performed* was in furtherance of his employer's purpose.

Because all the factors elucidated in *Backus* were met here, we hold that the trial court correctly determined that Palmerton was acting in the course of his employment when the accident occurred.[3]

Affirmed.

SAAD and HOEKSTRA, JJ., concurred with BOONSTRA, P.J.

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[3] Because plaintiff has expressly limited his appeal to this issue, we need not address other aspects of the trial court's ruling. See *Mich Ed Ass'n v Secretary of State*, 280 Mich App 477, 488; 761 NW2d 234 (2008) (stating that this Court will generally limit review to issues set forth in the appellant's questions presented), aff'd 489 Mich 194 (2011). We therefore do not disturb the trial court's holding that Palmerton's decisions to operate the airboat and his actual operation of the airboat did not constitute gross negligence. We also do not disturb the finding that Palmerton was acting within the scope of his authority, or at least that he reasonably believed he was so acting. Finally, we do not disturb the trial court's holding that the Roscommon County Sheriff's Department was engaged in a governmental function. In that regard, we note that plaintiff alleged in his complaint that defendants were not engaged in a governmental function. Defendants briefly argued below in their summary disposition motion that "Plaintiff cannot properly dispute that the operation of a police department is a governmental function." As an addendum to their summary disposition motion, defendants submitted the affidavit of Stevenson, which attested that the airboat was "primarily used for the purpose of ice rescues" and was being used at Winterfest "for the purpose of giving rides to members of the general public," "[a]s a public relations matter." While plaintiff's written response to the motion did not address the governmental function issue, the trial court engaged in a colloquy with counsel for the parties specifically on the question of whether public relations was a governmental function of a sheriff's office. The trial court held that it was. On appeal, plaintiff raised only the "course of employment" issue. In response, defendants nonetheless in part argued that plaintiff "cannot properly dispute that the use of the airboat for public relations constitutes a governmental function." In reply, plaintiff reiterated that the governmental function was "not raised" on appeal and "need not be addressed by this Court."

PEOPLE v HOWELL

Docket No. 300405. Submitted April 10, 2013, at Lansing. Decided April 25, 2013, at 9:00 a.m.

Marlon J. Howell was charged in the Wayne Circuit Court in three separate cases for offenses that he committed while on parole: an arson, a home invasion, and an assault. Pursuant to a plea agreement, the court, Carole F. Youngblood, J., sentenced defendant to serve 8 to 20 years' imprisonment in the arson case and, in the assault case, 1 to 5 years each for disarming a police officer and for being a felon in possession of a firearm and 2 years for possessing a firearm during the commission of a felony. The charges in the home-invasion case were dismissed. The initial judgments of sentence did not address defendant's status as a parolee, but, after several amendments, the court ultimately indicated that the sentences for the crimes at issue were to run consecutively to the sentence from which defendant was on parole. Defendant moved the trial court for relief from judgment, arguing that the trial court had violated his constitutional right to due process by imposing consecutive sentences without a hearing and that it had failed to give him the benefit of his plea bargain, which he apparently understood to have entailed sentences that would run concurrently to the sentence from which he was on parole. The trial court denied the motion, and defendant filed a delayed application for leave to appeal, which the Court of Appeals denied. Defendant then appealed in the Michigan Supreme Court, which, in lieu of granting leave to appeal, remanded to the Court of Appeals for consideration, as on leave granted, of whether the trial court erred by amending the judgments of sentence to impose consecutive sentences in light of MCR 6.435.

The Court of Appeals *held*:

1. The trial court's failure to address defendant's parole status in the original judgments of sentence was a mistake arising from an omission under MCR 6.435(A), because the court was required to make defendant's new sentences run consecutively to the sentence for which he was on parole pursuant to MCL 768.7a(2) and was required but failed to so specify pursuant to MCL 769.1h(1).

2. Defendant's plea agreement did not require the trial court to sentence him to serve concurrent sentences on all charges. The plea agreement indicated that the sentence in the assault case would be served concurrently with the sentence in the arson case and vice versa; it did not mention defendant's parole sentence or imply that either new sentence would be served concurrently with his parole sentence. Further, defendant's presentence investigation report indicated that he would be required to serve the new sentences consecutively to the sentence from which he was on parole, but he did not challenge the presentence investigation report on this ground at the sentencing hearing, and defense counsel indicated on the record that the defense sought no changes, corrections, or deletions with regard to the report.

3. Defendant was not entitled to a hearing before the trial court corrected his judgments of sentence under MCR 6.435(A) because the court rule did not require one and neither did defendant's right to due process, given that the court did not have discretion to sentence him any differently under MCL 768.7a(2). 491 Mich 919 (2012).

Affirmed.

1. SENTENCING — CRIMES COMMITTED WHILE ON PAROLE — CONSECUTIVE SENTENCES — CORRECTIONS TO JUDGMENTS OF SENTENCE — CLERICAL MISTAKES.

A sentencing court's failure to indicate on the judgment of sentence that the sentences imposed for crimes a defendant committed while on parole would run consecutively to the sentence from which the defendant was on parole pursuant to MCL 768.7a(2) is a clerical mistake that the court may correct under MCR 6.435(A).

2. SENTENCING — CRIMES COMMITTED WHILE ON PAROLE — CONSECUTIVE SENTENCES — CORRECTIONS TO JUDGMENTS OF SENTENCE — CLERICAL MISTAKES — HEARINGS.

A defendant is not entitled to a hearing before a sentencing court corrects a judgment of sentence under MCR 6.435(A) to indicate that the sentences imposed for crimes a defendant committed while on parole would run consecutively to the sentence from which the defendant was on parole (MCL 768.7a[2]).

*Bill Schuette*, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training and Appeals, and *Ana Quiroz*, Assistant Prosecuting Attorney, for the people.

Marlon J. Howell *in propria persona*.

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM. Defendant, Marlon Jermell Howell, appeals as on leave granted[1] the trial court's order denying his motion for relief from judgment[2] after the trial court amended his judgments of sentence to indicate that he must serve his new sentences consecutively to a previous parole sentence, as required by law. We affirm.

## I. FACTS

### A. THE SENTENCING AGREEMENTS

The prosecution charged Howell in three separate cases for offenses that he committed while he was on parole. For an arson that occurred on August 30, 2006, it charged Howell with six counts of assault with intent to commit murder, arson of a dwelling house, and felonious assault. For a home invasion that occurred on January 8, 2007, it charged Howell with first-degree home invasion, being a felon in possession of a firearm (felon-in-possession), and possessing a firearm during the commission of a felony (felony-firearm). And for an assault that occurred on January 15, 2007, it charged Howell with assault with intent to do great bodily harm less than murder, disarming a police officer, carrying a firearm in a vehicle, two counts of felon-in-possession, two counts of felony-firearm, and three counts of resisting or obstructing a police officer.

In the arson case, Howell agreed to plead guilty to arson of a dwelling house (1) if the prosecution agreed to dismiss the remaining charges in that case and

[1] *People v Howell*, 491 Mich 919 (2012).

[2] MCR 6.502.

dismiss the home-invasion case, and (2) if the trial court sentenced him to 8 to 20 years' imprisonment, to be served concurrently with the sentence in the assault case.

In the assault case, Howell agreed to plead guilty to attempted disarming a police officer, felon-in-possession, and felony-firearm (1) if the prosecution agreed to dismiss the remaining charges in that case and dismiss the home-invasion case, and (2) if the trial court sentenced him to serve terms of one to five years' imprisonment for the attempted-disarming and felon-in-possession charges, to be served concurrently with the arson case, and a consecutive term of two years' imprisonment for the felony-firearm charge.

Neither agreement addressed Howell's status as a parolee. Howell's presentence investigation report indicated that, because he was a parolee when he committed the offenses, he must serve the new sentences consecutively to the sentence from which he was on parole.

### B. THE SENTENCES AND AMENDMENTS

On September 21, 2007, Howell entered his pleas in the arson case and the assault case. On October 5, 2007, the trial court sentenced Howell to serve terms of (1) 8 to 20 years' imprisonment in the arson case; (2) one to five years' imprisonment for disarming a police officer and one to five years' imprisonment for felon-in-possession in the assault case, to be served concurrently with each other and to the arson case; and (3) two years' imprisonment for felony-firearm in the assault case, to be served consecutively to the other sentences.

The trial court's judgment of sentence in the arson case indicated that Howell would serve his sentence concurrently with his sentences in the assault case,

and did not give Howell any credit for jail time served. The trial court's judgment of sentence in the assault case checked the box indicating that Howell was to serve the sentences *consecutively* to each other, but also recommended that they be served *concurrently* with the file number corresponding to the assault case rather than the arson case. It also granted Howell 262 days' credit for time served. On October 11, 2007, Howell wrote the court to request that it also grant him 262 days' credit for time served on the arson case. The trial court denied his motion for jail credit on the basis that the law does not allow credit for time served to parole violators.

On November 9, 2007, the trial court amended the judgment of sentence in the assault case. The new judgment of sentence reflected that Howell was convicted of *attempted* disarming of a police officer, removed the indication that Howell was entitled to credit for time served, and, after the box checked "sentence(s) to be served consecutively to," stated "see recommendation." The court's recommendation clarified that Howell would serve the felony-firearm and attempted-disarming sentences consecutively, and that the sentences in the assault case were to run concurrently to those in the arson case.

Howell again wrote the court on August 19, 2009, requesting that the court correct his sentences in the assault case from consecutive to concurrent sentences. On September 14, 2009, the trial court again amended the judgment of sentence in the assault case, removing the word "attempted" and clarifying that the felony-firearm and disarming sentences were consecutive to each other *and* to the arson case. The judgment of sentence again failed to mention Howell's status as a parolee.

On October 21, 2009, the trial court amended the judgment of sentence in the assault case a third time to again add the word "attempted," and to indicate that Howell's sentence was "consecutive to parole." The term "consecutive to parole" typically refers to MCL 768.7a(2), which provides that a person must serve the remainder of the term of imprisonment for their previous offense before serving time for a new offense if he or she commits a felony while on parole.[3]

On October 22, 2009, the trial court amended the judgment of sentence in the arson case to add that Howell's sentence was "consecutive to parole."

### C. HOWELL'S MOTION FOR RESENTENCING

On March 5, 2010, Howell moved the trial court for relief from judgment and requested resentencing. Howell contended that the trial court violated his constitutional right to due process by imposing consecutive sentences without affording him the opportunity to be heard and represented by counsel, that it failed to give him the benefit of his plea bargain, and that it improperly eliminated his jail credit.

The trial court issued a written opinion and order. The trial court declined to revisit its October 2007 decision concerning Howell's jail credit. The trial court indicated that it amended Howell's sentence to correct a typographical error, to reflect the plea agreement by adding "attempt" to the charge of disarming a police officer, and "to run these files consecutive to the defendant's parole sentences according to Michigan law." The trial court opined that Howell misunderstood the judgment of sentence because it reflected the plea agreements—that is, the arson sentence was concur-

[3] See *People v Holder*, 483 Mich 168, 172 n 7; 767 NW2d 423 (2009).

rent with the assault case's sentences for felon-in-possession and disarming, and consecutive to the felony-firearm sentence. It further noted that "[t]he court's later amendment to the judgments ran both of [Howell's] files consecutive to his parole sentences as the law requires. [Howell], as a fourth habitual offender no doubt was informed that as a parolee any subsequent offenses would be served consecutive to his parole sentences." The trial court therefore denied Howell's motion for relief from judgment.

Howell filed a delayed application for leave to appeal in this Court, which we denied.[4] Howell sought leave to appeal in the Michigan Supreme Court. In lieu of granting leave to appeal, our Supreme Court remanded to this Court "for consideration, as on leave granted, of the issue whether the trial court erred in amending the judgments of sentence to impose consecutive sentences," and directing us to consider MCR 6.435, the Michigan court rule concerning a trial court's correction of error in a criminal judgment of sentence.[5]

## II. CORRECTION OF ERROR ON A JUDGMENT OF SENTENCE

### A. STANDARD OF REVIEW

This Court reviews de novo questions of law, including the interpretation and application of our court rules.[6] "[W]e interpret court rules using the 'same principles that govern the interpretation of statutes.' "[7]

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[4] *People v Howell*, unpublished order of the Court of Appeals, entered August 16, 2011 (Docket No. 300405).

[5] *Howell*, 491 Mich at 919.

[6] *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012).

[7] *People v Buie*, 491 Mich 294, 304; 817 NW2d 33 (2012), quoting *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011).

If the plain and ordinary meaning of a court rule's language is clear, judicial construction is not necessary.[8]

B. CORRECTION OF ERROR UNDER MCR 6.435

We conclude that the trial court appropriately modified Howell's judgments of sentence to correct an omission, and that neither our court rules nor standards of constitutional due process required it to give him a hearing before doing so.

"[C]orrections or modifications to a judgment of sentence must comply with the relevant statutes and court rules."[9] MCR 6.435 indicates when and how the trial court may correct an error in a criminal judgment of sentence:

> (A) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it.
>
> (B) Substantive Mistakes. After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous.

Under this court rule, the trial court may not modify a judgment of sentence that contains a substantive mistake after it has entered the judgment of sentence.[10] However, the trial court may correct "[c]lerical mistakes in judgments . . . and errors arising from oversight or omission . . . at any time[.]"[11] Thus, this case

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[8] See *People v Breidenbach*, 489 Mich 1, 8; 798 NW2d 738 (2011).

[9] *People v Holder*, 483 Mich at 176.

[10] *Id*. at 177; MCR 6.435(B).

[11] MCR 6.435(A).

hinges on whether the trial court's modification imposing Howell's new sentences consecutive to his parole sentence fell under MCR 6.435(A), in which case the trial court could correct the errors, or under MCR 6.435(B), in which case it could not.

1. THE AMENDMENT RELATING HOWELL'S NEW SENTENCES TO HIS PAROLE SENTENCE

We conclude that the trial court's failure to address Howell's parole status in the original judgments of sentence was a mistake arising from an omission under MCR 6.435(A), because the trial court was required to specify that Howell's new sentences were to be served consecutively with the sentence from which he was on parole, but it entirely failed to do so.

MCR 6.435(A) indicates that the trial court may correct "errors arising from oversight or omission[.]" When interpreting a court rule, we generally give words their plain and ordinary meanings.[12] Because our court rules do not define what an "omission" is, we will consider a dictionary definition to assist our interpretation.[13] *Random House Webster's College Dictionary* defines "omission" as "the act of omitting . . . [or] something left out, not done, or neglected,"[14] and defines "omit" as "to leave out; fail to include."[15]

MCL 769.1h(1) requires the trial court to specify whether a defendant's sentence is concurrent with or consecutive to any other sentence that the defendant is, or will be, serving. MCL 768.7a(2) provides that

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[12] *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

[13] See *id*.

[14] *Random House Webster's College Dictionary* (1997).

[15] *Id*.

> [i]f a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole . . . , the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment for the previous offense.

Thus, "consecutive sentencing is mandatory when someone commits a crime while on parole."[16]

Here, the trial court failed to specify whether Howell's sentences were concurrent with or consecutive to his parole sentence at both the sentencing hearing and in its first judgments of sentence. But our Legislature requires the trial court to both indicate whether any new sentences are consecutive to or concurrent with an existing sentence, and to make any new sentence consecutive to an existing parole sentence if the defendant committed the new offense while on parole. The trial court recognized on the record at the sentencing hearing that Howell was on parole, and Howell's presentence investigation report indicated that Howell's new sentences were to run consecutively to his parole sentence. Thus, the trial court's failure to address whether Howell's new sentences were consecutive to or concurrent with his parole sentence was an omission—something that the trial court "left out" or "failed to include" in its original judgment of sentence.

Further, our conclusion is consistent with the staff comment to MCR 6.435(B), which suggests that a substantive mistake is one based on the trial court's mistake of facts or law.[17] We recognize that a staff

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[16] *People v Chavies*, 234 Mich App 274, 280; 593 NW2d 655 (1999), overruled in part on other grounds *People v Williams*, 475 Mich 245, 254-255; 716 NW2d 208 (2006).

[17] MCR 6.435, 1989 staff comment.

comment is not binding authority.[18] But we consider the staff comment persuasive in this case because it is consistent with the plain language of MCR 6.435(B), which provides that "the court may *reconsider and modify, correct, or rescind* any order it concludes was erroneous." Here, the trial court did not reconsider or correct any previous action. Nor was the trial court operating under the mistaken belief that Howell was not actually on parole. As noted above, the presentence investigation report clearly mentioned Howell's parolee status, and the trial court recognized his status as a parolee at the sentencing hearing.

We conclude that our court rules allowed the trial court to amend Howell's judgments of sentence to reflect that he was to serve his new sentences consecutively to the sentence from which he was on parole at the time he committed the new offenses. The trial court's mistake was an omission within the meaning of MCR 6.425(A), not a reconsideration within the meaning of MCR 6.425(B).

2. THE PLEA AGREEMENT

Howell asserts that because his plea agreement specifically mentioned concurrent sentences, the trial court was required to sentence him to serve concurrent sentences on *all* charges. If this were true, it may have affected whether the trial court impermissibly modified the judgments of sentence to correct a mistake of fact. However, we disagree with Howell's reading of his plea agreement.

The plea agreement for the assault clearly indicates that his sentence would be "served concurrent w/ case no. 07-14033 [the arson case]"; it does not mention

[18] See *People v Petit*, 466 Mich 624, 632 n 9; 648 NW2d 193 (2002).

Howell's parole sentence. Similarly, the plea agreement for the arson case indicates that its "term [is] concurrent w/ case no. 07-11139 [the assault case]." The agreement refers only to Howell's new sentences; it does not even *imply* that Howell would serve either sentence concurrently with *his parole sentence*. Further, Howell's presentence investigation report indicated that, because he was a parolee when he committed the new offenses, he must serve the new sentences consecutively to the sentence from which he was on parole. Howell did not challenge the presentence investigation report on this ground at the sentencing hearing. Howell's counsel indicated on the record that "we have had a[n] opportunity to go over the presentence report . . . . No changes, corrections or deletions."

### C. ENTITLEMENT TO NOTICE AND A HEARING

We conclude that the court rule did not require the trial court to give Howell a hearing before correcting his judgments of sentence. The plain language of MCR 6.435(A) is that the trial court may correct clerical mistakes and omissions "at any time on its own initiative or on motion of a party, and after notice if the court orders it." There is no mention of a hearing in MCR 6.435(A). We will not add language to an unambiguous court rule.[19] Because MCR 6.435(A) does not require the trial court to give the defendant a hearing before correcting a clerical error, we conclude that the trial court did not err when it denied Howell's request for a hearing.

Further, we conclude that a defendant's rights to due process do not require the trial court to give a defendant a hearing before correcting a clerical error under

[19] See *Petit*, 466 Mich at 633.

MCR 6.435(A). Generally, a person's rights of due process include the " 'right to reasonable notice of a charge against him, and an opportunity to be heard in his defense . . . .' "[20] A defendant's due process rights must be satisfied before the trial court may correct a sentence.[21]

But this Court has held in several different contexts that, when the trial court corrects a mistaken sentence and it does not have discretion to sentence a defendant any differently, the defendant is not entitled to a hearing. In the context of MCR 6.429, which allows the trial court to modify an invalid sentence, this Court has concluded that even when the trial court was not aware at the time of sentencing that it was required to sentence a defendant to consecutive terms of imprisonment, the trial court was not required to resentence the defendant to correct the error because the trial court would not have been able to sentence the defendant any differently.[22] And in the context of statutory maximum sentences, where the trial court also lacks discretion, the trial court is not required by precepts of due process to give a defendant a hearing before correcting a mistaken maximum sentence.[23] We see no reason to distinguish those cases from this case.

MCL 768.7a(2) requires the trial court to make Howell's sentences consecutive to the sentences for which he was already on parole. The trial court does not have the discretion to impose any other sentence than that contained in the judgments of sentence as amended. Thus, we conclude that precepts of due pro-

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[20] *People v McGee*, 258 Mich App 683, 699; 672 NW2d 191 (2003), quoting *In re Oliver*, 333 US 257, 273; 68 S Ct 499; 92 L Ed 2d 682 (1948).

[21] *People v Harris*, 224 Mich App 597, 601; 569 NW2d 525 (1997).

[22] *People v Kaczorowski*, 190 Mich App 165, 174; 475 NW2d 861 (1991).

[23] *In re Pardee*, 327 Mich 13, 17-18; 41 NW2d 466 (1950).

cess did not entitle Howell to a hearing before the trial court corrected his judgments of sentence.

We affirm.

OWENS, P.J., and WHITBECK and FORT HOOD, JJ., concurred.

PEOPLE v JONES
PEOPLE V ANDERSON

Docket Nos. 309303 and 310314. Submitted March 12, 2013, at Grand Rapids. Decided April 25, 2013, at 9:05 a.m. Leave to appeal sought.

Melody T. Jones pleaded guilty in the Berrien Circuit Court of attempted welfare fraud of more than $500, MCL 400.60. The court, Dennis M. Wiley, J., sentenced Jones to 45 days in jail and imposed a fine, ordered restitution, and assessed various costs and fees, including a crime victims' rights assessment of $130. Jones filed a delayed application for leave to appeal, arguing that it was a violation of the Ex Post Facto Clauses of the United States and Michigan Constitutions to impose an assessment of $130 under MCL 780.905, as amended by 2010 PA 281, rather than an assessment of $60 under the prior version of MCL 780.905, as amended by 2005 PA 315, the version of the statute in effect when Jones committed her felony. Jones additionally argued that the court erred by imposing $1000 in court costs because the court failed to link those court costs to the particular expenses of her case.

Stacey R. Anderson pleaded guilty in the Wayne Circuit Court of second-degree murder, MCL 750.317. The court, Gregory D. Bill, J., sentenced Anderson to 16 to 30 years' imprisonment and ordered her to pay a crime victims' rights assessment of $130. Anderson filed a delayed application for leave to appeal, asserting the same ex post facto argument as Jones. The Court of Appeals granted both defendants leave to appeal and consolidated the cases.

The Court of Appeals *held*:

1. Both the United States Constitution, US Const, art I, § 10, and the Michigan Constitution, Const 1963, art 1, § 10, prohibit ex post facto laws. Michigan's prohibition of ex post facto laws is not more expansive than its federal counterpart. Ex post facto laws attach legal consequences to acts before their effective date and work to the disadvantage of the defendant. A statute disadvantages a defendant if (1) it makes punishable something that was not, (2) it makes an act a more serious offense, (3) it increases a punishment, or (4) it allows the prosecution to convict on less

evidence. *People v Earl*, 297 Mich App 104 (2012), however, held that imposing the increased assessment enacted by 2010 PA 281 for offenses committed before that law's effective date is not a violation of the Ex Post Facto Clauses. *Earl* bound subsequent panels of the Court of Appeals under MCR 7.215(C)(2) and (J)(1). Accordingly, the trial courts did not err in these cases by imposing the $130 crime victims' rights assessment on defendants.

2. Defendants argued that *Earl* was wrongly decided because it relied on obiter dictum from *People v Matthews*, 202 Mich App 175 (1993). Obiter dictum is an incidental remark or opinion related to but unnecessary to the case. Addressing an alternative argument is, however, necessary to the disposition of a case and consequently is not obiter dictum, which is what occurred in the portion of *Matthews* that *Earl* relied on. *Matthews* addressed two equal alternative bases for rejecting a particular argument raised by the defendant, and *Earl*, consequently, did not rely on obiter dictum in reaching its holding. Nothing in MCL 780.905 explicitly or implicitly sets forth the Legislature's intention regarding whether or not to make the assessment a punishment. That the assessment is imposed only if a defendant is convicted is not dispositive because while it may appear that way, the assessment does not act as a punishment in the legal sense given that it is tied to being a felon in the abstract, rather than to any specific crime. The assessment does not make the punishment for a crime more burdensome because it simply is not a consequence of any particular crime, but is a consequence of crime itself. *Earl* was not wrongly decided.

3. *People v Sanders*, 296 Mich App 710 (2012), held that a trial court may impose a generally reasonable amount of court costs under MCL 769.1k(1)(b)(*ii*) without the necessity of separately calculating the costs involved in the particular case. This holding was also binding, and the panel declined to disagree with it. Nor was it necessary to remand the case to the trial court for a hearing to establish a factual basis for the $1,000 in court costs to ensure a reasonable relationship between the costs imposed and the costs incurred in Jones's case, as was done in *Sanders*. The Court of Appeals had already upheld $1,000 in court costs as having a reasonable relationship to the cost of conducting a felony case in the Berrien Circuit Court (the jurisdiction of Jones's case) in *People v Sanders (After Remand)*, 298 Mich App 105 (2012).

Affirmed.

STEPHENS, P.J., concurring, acknowledged that she was compelled to follow *Earl* as binding precedent, but wrote separately to note that *Earl*'s reasoning was flawed and that the majority's conclusions were inconsistent with prior caselaw interpreting the

Ex Post Facto Clause of the Michigan Constitution. *Earl* incorrectly concluded that the assessment is not a punishment by relying almost exclusively on one paragraph of obiter dictum from *Matthews* that discussed restitution. The assessment is a punishment because the Legislature intended for it to be a punishment. The imposition of an additional $70 dollars increases defendants' punishment for conduct that occurred before the current version of MCL 780.905 took effect.

*Bill Schuette*, Attorney General, *John J. Bursch*, Solicitor General, *Arthur J. Cotter*, Prosecuting Attorney, and *Amy Byrd*, Assistant Prosecuting Attorney, for the people in *Jones*.

*Bill Schuette*, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Erin Leigh Birkam*, Assistant Prosecuting Attorney, for the people in *Anderson*.

State Appellate Defender (by *Douglas W. Baker*) for Melody T. Jones.

State Appellate Defender (by *Jacqueline J. McCann*) for Stacey R. Anderson.

Before: STEPHENS, P.J., and HOEKSTRA and RONAYNE KRAUSE, JJ.

HOEKSTRA, J. The defendant in Docket No. 309303, Melody Tynette Jones, pleaded guilty of attempted welfare fraud over $500, MCL 400.60. She was sentenced to 45 days in jail, and the trial court imposed a $300 fine, $1,000 in court costs, $1,556 in restitution, a $130 crime victims' rights assessment, and $68 as a minimum state cost under MCL 769.1j. The defendant in Docket No. 310314, Stacey Renee Anderson, pleaded guilty of second-degree murder, MCL 750.317. She was sentenced to 16 to 30 years' imprisonment, and the trial

court imposed a $130 crime victims' rights assessment and $68 as a minimum state cost. We granted both defendants' delayed applications for leave to appeal and consolidated the cases. Because we conclude that the imposition of the increased crime victims' rights assessment under 2010 PA 281 to offenses committed before that law's effective date is not a violation of the Ex Post Facto Clauses, we affirm.

On appeal, both defendants argue that the imposition of the $130 crime victims' rights assessment violated the Michigan and federal constitutional prohibitions of ex post facto laws. Unpreserved constitutional issues are reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Both the United States Constitution and the Michigan Constitution prohibit ex post facto laws. US Const, art I, § 10; Const 1963, art 1, § 10. Michigan's prohibition of ex post facto laws is not more expansive than its federal counterpart. *People v Callon*, 256 Mich App 312, 317; 662 NW2d 501 (2003). "All ex post facto laws share two elements: (1) they attach legal consequences to acts before their effective date, and (2) they work to the disadvantage of the defendant." *Id*. at 318. "A statute disadvantages an offender if (1) it makes punishable that which was not, (2) it makes an act a more serious offense, (3) it increases a punishment, or (4) it allows the prosecutor to convict on less evidence." *People v Slocum*, 213 Mich App 239, 243; 539 NW2d 572 (1995).

MCL 780.905(1) governs the payment and use of crime victims' rights assessments and currently provides in relevant part:

> The court shall order each person charged with an offense that is a felony, misdemeanor, or ordinance violation that is resolved by conviction, assignment of the defendant to youthful trainee status, a delayed sentence or

> deferred entry of judgment of guilt, or in another way that is not an acquittal or unconditional dismissal, to pay an assessment as follows:
>
> (a) If the offense is a felony, $130.00.

The crime victims' rights assessment found in MCL 780.905(1) is specifically authorized by the Michigan Constitution. Const 1963, art 1, § 24(3) ("The legislature may provide for an assessment against convicted defendants to pay for crime victims' rights."). At the time both defendants committed their felony offenses, the crime victims' rights assessment under MCL 780.905, as amended by 2005 PA 315, was $60. 2010 PA 281 amended MCL 780.905, effective December 16, 2010, increasing the crime victims' rights assessment to $130 when a defendant is convicted of a felony offense. Both defendants argue that the trial court's application of the $130 crime victims' rights assessment constituted a retroactive increase in punishment and thus was prohibited by the Ex Post Facto Clauses. However, we addressed the same issue in *People v Earl*, 297 Mich App 104; 822 NW2d 271 (2012). In *Earl*, we held that the imposition of the increased assessment under 2010 PA 281 to offenses committed before that law's effective date "is not a violation of the ex post facto constitutional clauses." *Id*. at 114. *Earl*'s holding is binding under MCR 7.215(C)(2) and (J)(1). Accordingly, the trial courts did not err by imposing the $130 crime victims' rights assessment on both defendants. See *Carines*, 460 Mich at 763-764.

While defendants argue that *Earl* was wrongly decided and urge us to take steps to bring the case before a conflict panel, MCR 7.215(J)(2), we find their arguments entirely unpersuasive. Defendants argue that *Earl* relied on obiter dictum in *People v Matthews*, 202 Mich App 175, 177; 508 NW2d 173 (1993). Obiter

dictum is an incidental remark or opinion related to but unnecessary to the case. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 437; 751 NW2d 8 (2008). Addressing an alternative argument is, in fact, necessary to the disposition of a case and consequently is not obiter dictum. *Id*. This is precisely what occurred in the portion of *Matthews* relied on in *Earl*: this Court addressed two equal alternative bases for rejecting a particular argument raised by the defendant. Therefore, we reject the contention that *Earl* relied on obiter dictum.

We find nothing in the plain text of the statute or the act explicitly or implicitly setting forth the Legislature's intention regarding whether or not to make the assessment a "punishment." The fact that the assessment is imposed only if a defendant is convicted is not itself dispositive. While it may be perceived as such, it does not act as a punishment in the legal sense because it is tied to being a felon in the abstract, rather than to any specific crime. Put another way, the assessment does not " ' "make[] more burdensome the punishment for a crime," ' " *People v Russo*, 439 Mich 584, 592; 487 NW2d 698 (1992), quoting *Dobbert v Florida*, 432 US 282, 292; 97 S Ct 2290; 53 L Ed 2d 344 (1977) (citation omitted), because it simply is not a consequence of any particular crime, but is a consequence of crime itself. Tellingly, the statute provides that a defendant can be charged only one such fee per criminal case, meaning that the more felonies one is convicted of at once, the *lower* the fee charged is per felony. Thus, it is effectively the opposite of the way in which punishment is expected to operate. We are unpersuaded that *Earl* was wrongly decided.

Jones in Docket No. 309303 also argues that the trial court erred by imposing $1000 in court costs because

the trial court failed to link those court costs to the particular expenses of the case. MCL 769.1k(1) provides:

> If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:
>
> (a) The court shall impose the minimum state costs as set forth in [MCL 769.1j].
>
> (b) The court may impose any or all of the following:
>
> (*i*) Any fine.
>
> (*ii*) Any cost in addition to the minimum state cost set forth in subdivision (a).
>
> (*iii*) The expenses of providing legal assistance to the defendant.
>
> (*iv*) Any assessment authorized by law.
>
> (*v*) Reimbursement under [MCL 769.1f].

In *People v Sanders*, 296 Mich App 710, 715; 825 NW2d 87 (2012), we held that "a trial court may impose a generally reasonable amount of court costs under MCL 769.1k(1)(b)(*ii*) without the necessity of separately calculating the costs involved in the particular case . . . ." This holding is binding under MCR 7.215(C)(2) and (J)(1), and again we decline to express our disagreement with this decision given that we find Jones's arguments unpersuasive. Jones's argument that the trial court erred by failing to link the imposed court costs to the particular expenses of the case is meritless. *Id*.

Alternatively, Jones asks us to remand the case to the trial court for a hearing to establish a factual basis for the $1,000 in court costs to ensure a reasonable rela-

tionship between the costs imposed and the costs incurred in this case, as ordered by the panel in *Sanders*, 296 Mich App at 715-716. However, this alternative relief is unnecessary because we have already upheld $1,000 in court costs as having a reasonable relationship to the cost of conducting a felony case in the Berrien Circuit Court, the jurisdiction of defendant's case. *People v Sanders (After Remand)*, 298 Mich App 105, 108; 825 NW2d 376 (2012).

Affirmed.

RONAYNE KRAUSE, J., concurred with HOEKSTRA, J.

STEPHENS, P.J. (*concurring*). The majority bases its conclusion with regard to the crime victims' rights assessment exclusively on *People v Earl*, 297 Mich App 104; 822 NW2d 271 (2012). I acknowledge that I am compelled to follow *Earl* because it is binding precedent. MCR 7.215(J)(1). However, I write separately to note that, in my view, *Earl*'s reasoning is flawed and that the majority's conclusions are therefore inconsistent with other, prior caselaw interpreting the Ex Post Facto Clause. Specifically, *Earl* concluded that the assessment is not a punishment and is therefore outside the ambit of the Ex Post Facto Clause of the Michigan Constitution. *Id*. at 114. In reaching this conclusion, *Earl* relied almost exclusively on one paragraph from *People v Matthews*, 202 Mich App 175, 177; 508 NW2d 173 (1993), in which this Court noted that the "assessment is not intended to be a form of restitution . . . ." However, because that sentence from *Matthews* was "not essential to the disposition of the case," it constitute[d] obiter dicta and lack[ed] the force of a binding adjudication." *People v Crockran*, 292 Mich App 253, 258; 808 NW2d 499 (2011). Indeed, unlike the majority and the *Earl* Court, I agree with defendants that the

assessment is a punishment because the Legislature intended for it to be a punishment. See MCL 780.905; see also *Smith v Doe*, 538 US 84, 92; 123 S Ct 1140; 155 L Ed 2d 164 (2003). The majority's conclusion is therefore contrary to prior Ex Post Facto Clause caselaw because the imposition of an additional $70 "increases [defendants'] punishment" for conduct occurring before the current version of the crime victims' rights assessment statute took effect. *People v Slocum*, 213 Mich App 239, 243; 539 NW2d 572 (1995); see also *In re Contempt of Henry*, 282 Mich App 656, 681-684; 765 NW2d 44 (2009), *People v Hill*, 267 Mich App 345, 350-352; 705 NW2d 139 (2005).

KAFTAN v KAFTAN

Docket Nos. 301075 and 301495. Submitted March 5, 2013, at Detroit. Decided April 25, 2013, at 9:10 a.m. Leave to appeal sought.

Melvin M. and Carole K. Kaftan brought actions against each other in the Oakland Circuit Court in connection with the settlement they signed during their divorce proceedings in 2001, which called for Melvin to make a series of payments to Carole through 2017 totaling approximately $7.7 million. After Melvin stopped making payments in 2009, Carole sought to recover the remaining payments due under the settlement agreement, while Melvin sought a modification or rescission of the contract because certain real estate assets he had retained under the agreement turned out to have been incorrectly valued, partially because of fraud perpetrated by a business partner. The parties both moved for summary disposition under MCR 2.116(C)(10), and Carole moved for sanctions against Melvin. The court, John J. McDonald, J., granted summary disposition in favor of Carole, but it denied her motion for sanctions. In Docket No. 301075, Melvin appealed the grant of summary disposition, and Carole cross-appealed the court's failure to impose sanctions. In Docket No. 301495, Melvin appealed the judgment awarding Carole back payments and other relief. The cases were consolidated for appeal.

The Court of Appeals *held*:

1. The trial court properly concluded that no modifications could be imposed outside those provided for in the settlement agreement itself because the agreement did not provide for any modifications absent fraud by one of the parties, did not state an intent to divide the sum of all assets equally, contained numerous disclaimers and assertions of finality, and was made by sophisticated parties. Under the terms of the agreement, fraud by a third party that caused an error in valuation of assets when the agreement was made did not constitute a mutual mistake.

2. The trial court did not abuse its discretion by rejecting Carole's request for sanctions because the case was legally and factually complicated, no Michigan case was sufficiently similar to command the result, and Melvin's arguments were not devoid of arguable legal merit.

Affirmed.

*Brooks Wilkins Sharkey & Turco, PLLC* (by *Keefe A. Brooks*), for Carole K. Kaftan.

*Dickinson Wright PLLC* (by *Timothy A. Stoepker* and *Dennis C. Kolenda*) and *Pierce Duke Farrell & Tafelski PLC* (by *Mark C. Pierce*) for Melvin M. Kaftan.

Before: CAVANAGH, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM. This case involves a dispute over the settlement signed by the parties in December of 2001, during their divorce proceedings. The agreement called for Melvin Kaftan to make a series of payments to Carole Kaftan. After Melvin stopped making payments in 2009, the parties each filed suit against the other. Carole sought to recover the remaining payments due under the settlement agreement, while Melvin sought a modification or rescission of the contract because certain real estate assets retained by him under the agreement turned out to be incorrectly valued, in part because of predivorce fraud perpetrated by a business partner. We affirm. Even assuming that the statute of limitations does not bar Melvin's arguments, he has failed to assert facts that would properly constitute a defense or claim of mutual mistake.

## I. FACTS

The parties signed the property settlement agreement on December 29, 2001. The agreement did not contain a valuation of the estate. However, a financial statement prepared for Melvin, and reviewed by an expert chosen by Carole, set the value at $14,517,000. A large portion of the marital estate consisted of real estate holdings, which Melvin mostly retained under

the agreement. In return, the agreement called for him to make a series of payments to Carole through 2017, totaling $7,704,000.[1]

The property settlement agreement contains multiple indications that it was meant to permanently resolve all questions relating to the parties' marital property. It declares that the parties "are now desirous of definitely and for all times settling and determining all issues pertaining to property division . . . and all other claims or rights between them . . . ." It prohibits any amendment or modification except by further written agreement, and also does not authorize the circuit court to modify any provisions except by stipulation of the parties. The agreement does not state that the parties intended to divide their assets 50-50, and it contains no valuations of the individual properties at issue. Moreover, the agreement states that "[t]here are no representations or warranties other than those expressly herein set forth" and that each party acknowledged their right to "verification of facts" relevant to the agreement. The agreement did make provision for fraud or concealment, but only if committed by one of the parties: "The release shall not operate to release either party from any fraudulent acts, intentional nondisclosure of assets and liabilities, misrepresentations or conduct, which may become known hereafter and detrimentally affect the other party."

Melvin made all payments through 2008, but stopped making payments in 2009. When asked at his deposition why he stopped paying, Melvin responded that Carole had refused to help him cover their son's losses in a business deal. He also testified that the reason he stopped making

[1] This amount was divided into $2,388,000 in payments falling under section 71 of the Internal Revenue Code, 26 USC 71, and $5,316,000 in "additional property settlement."

payments was that he discovered that, through the fraud of a business partner, the real estate holdings had actually been worth only $4,936,000 in 2001, not $14,517,000 as the parties had thought at the time.

Several of the real estate projects that Melvin retained in the divorce were organized, managed, and partly owned by Rodney Robinson. According to Melvin, in 2002, after the settlement agreement was completed, he learned that Robinson was in financial difficulties. Melvin had guaranteed a number of loans for the projects he invested in with Robinson, and as these projects defaulted on their loans, banks were threatening to pursue collection efforts against Melvin. As a result, Melvin and Robinson traded properties in a number of swap agreements, beginning in July 2002, so that Melvin could completely separate his holdings from Robinson.[2]

Melvin asserts that in December 2008, he learned that Robinson had been jailed for fraud in a project unrelated to Melvin's investments. Melvin's additional investigations revealed that before the Kaftans' divorce Robinson had committed fraud regarding the properties he and the Kaftans owned. Specifically, Melvin claims that Robinson took money from some projects to pay debts for others, falsified construction lien waivers, secretly mortgaged projects, and sold some projects while continuing to list them as assets.

Melvin testified that he did not know about Robinson's fraudulent activities before December 2008. However, he also admitted at his deposition that he discovered some irregularities in 2002 while conducting the swap agreements with Robinson. Melvin testified regarding a property called Woodlands Office Park:

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[2] For example, instead of each owning 50% of property A and property B, one would take 100% of A and the other 100% of B.

> When we went to the swap it came out [Robinson] took a nine hundred and some thousand dollar mortgage to build a building on it for himself. We were right in the midst of getting all of those documents from the bank to show that he stole that piece of land from me. In the swap he was broke. I had to take . . . about a half a million dollars that he's going to owe me.

He later added, "Well, Mr. Robinson stole it from me. We found out at the swap time." In addition, Robinson's company Land Equities had already defaulted on a loan owed to Melvin by the time of the divorce.

Melvin and Carole each filed suit against the other on September 15, 2009, and later filed motions for summary disposition under MCR 2.116(C)(10). The trial court granted summary disposition in favor of Carole, holding that Melvin's argument of mistake was barred by the statute of limitations and laches, and also that he failed to establish a mutual mistake. Carole also sought sanctions as part of her motion for summary disposition, but the trial court refused to grant them. Melvin appealed the grant of summary disposition, and Carole cross-appealed the trial court's failure to impose sanctions against Melvin.

## II. STANDARD OF REVIEW

We review de novo grants of summary disposition. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). Equitable issues, such as arguments for rescission or reformation, are also reviewed de novo. See *Stevenson v Aalto*, 333 Mich 582, 588; 53 NW2d 382 (1952).

## III. MUTUAL MISTAKE

A mutual mistake is "an erroneous belief, which is shared and relied on by both parties, about a material

fact that affects the substance of the transaction." *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 442; 716 NW2d 247 (2006). Carole relies primarily on two cases to argue that there is no mutual mistake in this case. In *Marshall v Marshall*, 135 Mich App 702; 355 NW2d 661 (1984), a husband sought to modify a property settlement agreement after stocks that he received in the agreement later sold for less than he expected. Similarly, in *Smith v Smith*, 292 Mich App 699; 823 NW2d 114 (2011), a wife sought to modify a settlement agreement after the value of an individual retirement account (IRA) assigned to her husband under the contract increased substantially. In each case, the court denied relief because the "mistake" involved only the final selling price of the stocks and the IRA, and thus was external to the contract.

Melvin responds that these cases involved changes in value postdivorce while the instant case involves a mutual error in valuation at the time of the property settlement. We agree that a postdivorce fluctuation in value more plainly falls outside the parameters of mutual mistake. However, under the terms of this settlement agreement, the instant circumstances do not constitute a mutual mistake. As described earlier, the agreement did not provide for any modifications absent fraud by one of the parties, did not state an intent to divide the sum of all assets equally, and contained numerous disclaimers and assertions of finality.

A similar scenario was recently considered by the New York Court of Appeals[3] in *Simkin v Blank*, 19 NY3d 46; 945 NYS2d 222; 968 NE2d 459 (NY, 2012). In that case, part of the marital estate being divided consisted of an investment account that, because of

[3] The highest appellate court in New York is the Court of Appeals, rather than the Supreme Court.

Bernard Madoff's Ponzi scheme, was later determined to have been worth far less than the parties believed at the time of their agreement. The trial court had held that a cause of action for mutual mistake was permitted under the circumstances. However, the Court of Appeals held that although the Ponzi scheme was ongoing at the time the agreement was signed, the situation was more akin to cases in which a marital asset unexpectedly loses value after dissolution of a marriage, and therefore did not constitute a mutual mistake. *Id*. at 55. The court noted that the agreement, like the one in this case, did not explicitly state that the property was to be divided equally, nor did it explicitly value the relevant asset account. *Id*. at 54.

Though it is not controlling, we find the New York Court of Appeals' reasoning in *Simkin* to be persuasive, especially given the factual similarity to the present case. In this case, as in *Simkin*, the husband bargained to retain property that he now asserts was affected by a third party's fraud at the time of the divorce. The agreement here, like in *Simkin*, does not place a specific value on the real estate or indicate that it must be divided equally. Further, the agreement evinces an intent by the parties to permanently resolve the distribution of their marital property. Melvin agreed to pay Carole a sum certain, without regard to changes in the real estate market in general or to factors affecting only his specific holdings.

In *Smith*, this Court noted:

> The values of the retirement accounts were stated in fixed terms. It is well known that stocks fluctuate on a daily basis. The parties were free to fix the values of the accounts at any time. They could have fixed the value at the time the divorce complaint was filed or at the time the divorce judgment was entered. They could have expressly provided that the division of the retirement accounts was subject to

> modification for market fluctuations. However, they did not do any of this. [*Smith*, 292 Mich App at 704-705].

Similarly, in the present case the parties could have included terms in the settlement agreement providing for the payments to Carole to be adjusted based on changes in the value of the real estate properties or qualifying Melvin's promise to pay in the event of any unforeseen or unforeseeable circumstances. However, while the agreement contains provisions allowing for adjustment of the property settlement in case of fraud by the parties themselves, it contains no such provisions for fraud by a third party or unknown inaccuracies in either or both of the parties' assessment of value.

Accordingly, we conclude, as did the trial court, that given the detailed nature of the written agreement between sophisticated parties, we may not impose modifications outside those provided for in the agreement itself.

## IV. SANCTIONS

Carole's motion for summary disposition included a request for sanctions that the trial court denied. We review a trial court's decision regarding sanctions for an abuse of discretion. *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 450; 540 NW2d 696 (1995).

The trial court did not abuse its discretion by rejecting Carole's request for sanctions. This case was complicated, both legally and factually, and no Michigan case was sufficiently similar to command without question the result we have reached. Though Melvin's arguments ultimately failed, they were not devoid of arguable legal merit. *Kitchen v Kitchen*, 465 Mich 654, 662-663; 641 NW2d 245 (2002); MCL 600.2591(3).

V. CONCLUSION

The trial court correctly ruled that Melvin failed to state a claim or defense of mutual mistake. Summary disposition in favor of Carole was therefore appropriate. The trial court did not abuse its discretion by denying Carole's request for sanctions.

Affirmed.

CAVANAGH, P.J., and SAAD and SHAPIRO, JJ., concurred.